United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

7-4

596

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 22,755

IN THE MATTER OF BALOGH & COMPANY, INC.,

Bankrupt,

DRS. WILLIAM T. SPENCE, WILLIAM D. DOLAN, RAYMOND SCHWARTZ,

Appellants.

Appeal from the United States District Court
for the District of Columbia

APPENDIX

SAMUEL M. GREENBAUM
401 Tower Building
1401 K Street, N. W.
Washington, D. C. 20005

Attorney for Edward J. McGrath,
Trustee in Bankruptcy, APPELLEE

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The printing of this Appendix was necessitated by the fact that appellants failed to include in their Appendix the matter which appellee indicated in its "Statement of Appellee Covering Contents of Joint Appendix." Thus, this Appendix is prepared pursuant to this court's order of April 29, 1969, directing that appellee file an Appendix to his brief.

In order to facilitate use of Appendix material, page numbers in this Appendix begin with page 27 as appellants' Appendix contained 26 pages of material.

[Filed - September 17, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of	)	
	)	
BALOGH & COMPANY, INC.	)	In Bankruptcy No. 69 - 34
	)	
Bankrupt	)	

ORDER

1. Enjoining William T. Spence, (a) Plaintiff in Civil Action 2997-63, United States District Court for the District of Columbia, and (b) Plaintiff in Attachment Action No. 96-86, Circuit Court of Arlington County, Virginia, and

2. Enjoining First National Bank of Arlington, and

3. Order to Show Cause why the Escrow Deposit in the First National Bank of Arlington should not be Turned over to the Trustee

At WASHINGTON, D. C., this 17 day of September, 1964.

Upon consideration of the Trustee's Motion to Enjoin (1) William T. Spence, (a) Plaintiff, Civil Action 2997-63, United States District Court for the District of Columbia, and (b) Plaintiff, Attachment Action No. 96-86, Circuit Court of Arlington County, Virginia, and to Enjoin (2) First National Bank of Arlington, and (3) For Order to Show Cause why the Escrow Deposit in said Bank should not be Turned over to the Trustee, and good cause therefor having been alleged; and it appearing that William T. Spence should immediately be enjoined from further pursuing and prosecuting suits filed in the United States District Court for the District of Columbia, Civil Action No. 2997-63, and in the Circuit Court of Arlington County, Virginia, attachment action No. 96-86, and likewise that the First National Bank of Arlington should be enjoined in the manner and for the reasons specified in said Motion, and that William T. Spence, the First National Bank of Arlington,

FILED

and Stephen E. Balogh should show cause to this court why said actions should not be permanently enjoined, and why the property of the bankrupt in said bank should not be turned over to the Trustee, and all claims thereagainst asserted as well as all claims asserted by any of said parties against the bankrupt growing out of matters growing out of said complaint should not be asserted in this proceeding, IT IS

ORDERED that William T. Spence, his agents, attorneys and representatives, be and he hereby is restrained ex parte from pursuing further action in Civil Action No. 2997-63 in the United States District Court for the District of Columbia, or in attachment action No. 96-86 in the Circuit Court for Arlington County, Virginia, or from commencing any further or other action, other than in the above-captioned proceeding, relating to or in respect to claim or claims subject of the above-numbered plenary actions; and it is further

ORDERED that the First National Bank of Arlington, its agents, attorneys and representatives, be and it hereby is restrained ex parte from further proceedings in connection with the action pending in the Circuit Court for Arlington County, Virginia, attachment proceeding No. 96-86, and from setting off or attempting to set off against any asset, credit, or property of the bankrupt in said bank any claim arising upon any alleged obligation to the bankrupt herein in the sum of $9,000.00, or in any sum whatsoever; and it is further

ORDERED that

William T. Spence
3715 Idaho Avenue, N. W.
Washington, D. C.

First National Bank of Arlington
801 North Glebe Road
Arlington, Virginia

Stephen E. Balogh
2144 California Street, N. W.
Envoy, Apt. #704
Washington, D. C.

show cause before this court on the 20 day of October, 1964, at 10 A.M. in Room 2104 United States Court House, Third Street and Constitution Ave., N. W., Washington, D. C.,

(1) Why William T. Spence, his agents, attorneys and representatives, should not be permanently enjoined from further pursuing his claims against the bankrupt and others as set forth in Civil Action No. 2997-63 in the United States District Court for the District of Columbia, and in attachment action No. 96-86 in the Circuit Court for Arlington County, Virginia, and why the claims subject of the said civil actions should not be asserted in this proceeding for summary adjudication by this court;

(2) Why the First National Bank of Arlington, its agents, attorneys and representatives, should not be enjoined from setting off or attempting to set off any claim it asserts against the bankrupt against such property, assets, deposits, or credits of the bankrupt in said bank and why it should not assert said claim for summary adjudication by this court in the above-captioned proceeding;

(3) Why such property, credit, assets, or deposits of the bankrupt corporation, or belonging to the bankrupt corporation for the benefit of its customers and creditors on deposit in the First National Bank of Arlington, should not be turned over to the Trustee in Bankruptcy herein for deposit as

an asset of the bankrupt estate for the benefit of its creditors.

and it is further

ORDERED that on or before five (5) days from the date of the hearing set herein, if said parties respondent oppose the granting of the relief prayed for in said Motion, that they shall cause written opposition thereof to be filed in this court and a copy of said opposition served upon Samuel M. Greenbaum, Esq., attorney for the Trustee in Bankruptcy, 401 Tower Building, Washington, D. C. 20005; and it is further

ORDERED that the Trustee in Bankruptcy be and he hereby is directed to cause a certified copy of this Order and the Motion appended hereto to be served by first class mail, postage prepaid, upon the aforenamed respondents at the addresses hereinabove set forth, and, in addition thereto, upon:

Cornelius H. Doherty, Esq.
Attorney of record for William T. Spence
1010 Vermont Ave., N. W.
Washington, D. C. 20005

Peter J. Kostik, Esq.
Attorney for First National Bank of Arlington
2046 Wilson Blvd.
Arlington, Virginia

Kieffer & Maroney
Attorneys for Stephen E. Balogh
Suite 1037
1875 Connecticut Ave., N. W.
Washington, D. C.

and further, said Trustee is directed to cause a certified copy of this Order to be served by mail or personally upon:

Clerk, Civil Division
U. S. District Court for the District of Columbia
Third Street and Constitution Ave., N. W.
Washington, D. C.

with a request that said Order be docketed in the pending action in said court above designated, and to the

Clerk,
Circuit Court for Arlington County
Arlington, Virginia

with a request that said Order be docketed in the pending action in said court above designated.

PROVIDED further, that said Trustee shall cause the service of the foregoing copies to be made on or before five (5) days from the date of the entry of this Order and shall certify to said service.

Referee in Bankruptcy

[Caption Omitted in Printing]

MOTION TO ENJOIN (1) WILLIAM T. SPENCE, (a) PLAINTIFF, CIVIL ACTION 2997-63, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, and (b) PLAINTIFF, ATTACHMENT ACTION No. 96-86, CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA, AND TO ENJOIN (2) FIRST NATIONAL BANK OF ARLINGTON
and
(3) FOR ORDER TO SHOW CAUSE WHY THE ESCROW DEPOSIT IN SAID BANK SHOULD NOT BE TURNED OVER TO THE TRUSTEE

TO THE HONORABLE JOHN A. BRESNAHAN, Referee in Bankruptcy:

Edward J. McGrath, duly appointed and qualified Trustee in Bankruptcy of the above-captioned estate, respectfully represents:

1. He was appointed by this court as Trustee on the 10th day of September, 1964, and thereafter duly qualified by giving bond in the directed amount.

2. There is scheduled, on Schedule A-3 filed in this proceeding, a claim of William T. Spence, 3715 Idaho Avenue, N. W., Washington, D. C., upon which two suits have been filed, viz:

(a) United States District Court for the District of Columbia, Civil Action No. 2997-63, filed December 16, 1963. Said suit is a complaint seeking recovery of a commission retained by the bankrupt corporation in transactions involving said William T. Spence, for a mandatory injunction and for damages, with interest at 6% from October 14, 1963, plus costs. Counterclaim on behalf of the bankrupt corporation was filed in said action on, to-wit, January 8, 1964, in the sum of $284,330.00. (For details see Schedule B-3(c) of the bankrupt's schedules filed herein.)

(b) A notice of Motion for Judgment initiated in the Circuit Court for Arlington County, Virginia, in Attachment Action No. 96-86, was filed on March 30, 1964. Thereafter, upon an attachment issued to the Sheriff of Arlington County, funds in the First National Bank of Arlington, in an escrow account entitled "Balogh & Company Escrow Account", in the sum of $12,200.00 were attached. Named in the said suit as co-defendants, in addition to the bankrupt corporation, were Stephen E. Balogh, individually, and the First National Bank of Arlington.

Petitioner, as of this date, has not had the opportunity to review all pleadings in the foregoing court actions; however, due to the emergent and expedient matters confronting him in regard thereto, seeks an injunction to issue by this court directing William T. Spence, plaintiff in both actions, his agents, attorneys and representatives, and others, acting directly in his behalf, from further action or proceeding in connection with either of said actions, or from commencing any other action other than in this proceeding in regard to the claim or claims asserted against the defendants in said actions.

3. There is presently pending a hearing set for September 29, 1964 before the Circuit Court, Arlington County, Virginia, upon the Motion to Quash the attachment effected by the Sheriff upon the plaintiff's Motion for Judgment.

4. Petitioner is informed that the First National Bank of Arlington has filed an answer acknowledging a deposit in the name of "Balogh & Company Escrow Account" in said bank in a sum sufficient to satisfy the attachment. Further, said bank asserts a right of set-off to the extent of $9,000.00 for alleged obligations owing by Balogh & Company, Inc. to said bank providing said funds are determined to be the funds of Balogh & Company.

5. Petitioner states that the pending litigation instituted by William T. Spence, with the exception of the funds under attachment, at best, if said plaintiff succeeds in his actions, would constitute a claim or claims assertable by Proof of Claim in the bankruptcy proceeding.

6. Petitioner asserts that the multiplicity of actions pending on which the bankrupt corporation has already in the United States District Court for the District of Columbia asserted a substantial counterclaim, could be expediently and summarily adjudicated by this court pursuant to a properly filed Proof of Claim, and that to require petitioner to undertake defense of said plenary actions and the assertion of bankrupt's counterclaim in one of said actions, and the pursuit of the Motion to Quash the attachment in the other of said actions, will unduly delay and interfere with the administration of the estate and require the incurrence of substantially greater expense in said plenary litigation than would be required in a summary proceeding before this court.

7. The account in the First National Bank of Arlington, designated an escrow account, is an account, the ownership of which is in the bankrupt corporation to which petitioner, as Trustee, succeeds in interest and title, and the beneficiaries thereof are customers and creditors of the bankrupt with claims scheduled in this proceeding. The proper administration of this proceeding requires that said fund be turned over to petitioner as Trustee,and those asserting claims thereagainst be required to initiate by appropriate pleading in this cause, action in support of claims to said fund. Petitioner should not be required to undertake the expense of plenary litigation interfering with the orderly administration of this estate and entailing substantial expense to the detriment of creditors. All assets and property belonging to the bankrupt as of the date of the filing of the petition in bankruptcy are in custodia legis, and any proceedings affecting said property or assets should be enjoined pursuant to this court's power as provided under Section 2a(15) of the Bankruptcy Act.

WHEREFORE, premises considered, it is prayed:

(1) That this court immediately issue an injunction ex parte restraining William T. Spence, his agents, attorneys and representatives from pursuing further action in Civil Action No. 2997-63 in the United States District Court for the District of Columbia, or in attachment action No. 96-86, in the Circuit Court for Arlington County, Virginia, or from commencing any further or other action, other than in the above-captioned bankruptcy proceeding, relating to or in respect to claim or claims subject of the above-numbered plenary actions.

(2) That this court immediately issue an injunction ex parte restraining the First National Bank of Arlington, its agents, attorneys and representatives, from further proceedings in connection with the action pending in the Circuit Court for Arlington County, Virginia, attachment proceeding No. 96-86, and from setting off or attempting to set off against any asset, credit, or property of the bankrupt in said bank any claim arising upon any alleged obligation to said bankrupt in the sum of $9,000.00, or in any other sum whatsoever.

(3) That an Order to Show Cause issue directing William T. Spence, First National Bank of Arlington, and Stephen E. Balogh to show cause why any deposit,fund, credit, or account, or property of the bankrupt, or to which the bankrupt is entitled, in the First National Bank of Arlington, Arlington, Virginia, should not be turned over to the Trustee in Bankruptcy, and why any claim or claims to said property or assets by any party asserting claims thereto should not be asserted in this proceeding.

And for such other and further relief as this Honorable Court may deem just and proper.

Edward J. McGrath
Trustee in Bankruptcy

Samuel M. Greenbaum
Attorney for the Trustee
401 Tower Building
Washington, D. C. 20005
347-2626

POINTS and AUTHORITIES IN SUPPORT OF THE FOREGOING MOTION TO ENJOIN (1) WILLIAM T. SPENCE, (a) PLAINTIFF, CIVIL ACTION 2997-63, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, and (b) PLAINTIFF, ATTACHMENT ACTION No. 96-86, CIRCUIT COURT FOR ARLINGTON COUNTY, VIRGINIA, AND TO ENJOIN (2) FIRST NATIONAL BANK OF ARLINGTON, and (3) FOR ORDER TO SHOW CAUSE WHY THE ESCROW DEPOSIT IN SAID BANK SHOULD NOT BE TURNED OVER TO THE TRUSTEE

In support of the foregoing Motion, petitioner respectfully invites this court's attention to the following points and authorities:

1. Section 2a(15) of the Bankruptcy Act (11 USC 11a(15))

2. Volume 1, Collier on Bankruptcy, 14th Edition, pages 300 through 343, paragraphs 2.62 through 2.66.

3. Isaacs vs. Hobbs Tie & Timber Co., 282 US 734, 51 SCt 270, 75 LEd 645.

Samuel M. Greenbaum
Attorney for the Trustee

[Caption Omitted in Printing]

ANSWER OF WILLIAM T. SPENCE TO THE ORDER TO SHOW CAUSE AND FOR AN ORDER DIRECTING THE RELEASE OF THE FUNDS TO WILLIAM T. SPENCE

William T. Spence, through his attorney, Cornelius H. Doherty, for answer to the order to show cause why the escrow deposit in the First National Bank of Arlington should not be turned over to the trustee and for an order directing the trustee to release the escrow fund of Twelve Thousand Two Hundred ($12,200.00) Dollars to William T. Spence, and for a dismissal of the counter-claim of the

bankrupt in the case of Spence vs. Balogh & Company, Civil Action Number 2997-63, and for reasons therefore submits the following:

1. The record of the United States District Court for the District of Columbia in the case of Spence vs. Balogh & Company, Civil Action Number 2997-63, and Spence vs. Balogh & Company, Civil Action Number 1757-61, clearly disclose that the Twelve Thousand Two Hundred ($12,200.00) Dollars in issue was a part of an escrow fund created on September 16, 1959 in the First National Bank of Arlington, for the sole purpose of buying Six Thousand Two Hundred and Twenty (6,220) Shares of stock of the Northern Virginia Doctors Hospital Corporation for a net price of Sixty Two Thousand and Two Hundre ($62,200.00) Dollars.

2. That the fund so created is not an asset of the bankrupt by reason of its exemptions under Title 11, Section 96 (e)(4) U.S.C.A.

F I L E D

OCT 15 1964

JOHN A. BRESNAHAN
REFEREE IN BANKRUPTCY

3. That the alleged claim of Balogh & Company as set forth in its counter-claim in the case of Spence vs. Balogh & Company, Civil Action Number 2997-63, is a compulsory counter-claim under Rule 13(a) of the Federal Rules of Civil Procedure, and not having been claimed in that proceeding it is res judicata.

4. The depositions of Stephen E. Balogh, President of the bankrupt company, were taken in the case of Spence vs. Balogh & Company, Civil Action Number 2997-63, on February 21, 1964 and

April 10, 1964, clearly disclose that it has no claim against Spence on its counter-claim.

ARGUMENT

On August 3, 1959, Balogh & Company was the underwriter for the sale of stock of the Northern Virginia Doctors Hospital Corporation, which was to be sold by it at a price of Ten ($10.00) Dollars a share, out of which the bankrupt was to receive a commission of Fifteen (15%) per cent.

On August 3, 1959, Spence purchased Six Thousand Two Hundred and Twenty (6,220) Shares of this stock and on August 6, 1959, a Treasurers check in the sum of Sixty Two Thousand and Two Hundred ($62,200.00) Dollars was delivered to Balogh & Company in payment thereof.

On the morning of August 4, 1959, the bankrupt's agreement with the Northern Virginia Doctors Hospital Corporation was cancelled, and the bankrupt was not able to complete delivery of the stock, and on September 16, 1959, the Sixty Two Thousand and Two Hundred ($62,200.00) Dollars was placed in an escrow account in the First National Bank of Arlington, where it was subject to the check of Balogh & Company only for the purpose of paying for Six Thousand Two Hundred and Twenty (6,220) Shares of the stock of the Northern Virginia Doctors Hospital Corporation and pending the end of the litigation in the Circuit Court of Arlington County to require the Hospital Corporation to make the stock available.

The litigation in Virginia ended with the decision that the bankrupt was the agent of the Hospital Corporation and that the Hospital Corporation could cancel the bankrupt's authority to sell it's stock at any time.

Spence then instituted an action against Balogh & Company in the United States District Court for the District of Columbia, being Civil Action Number 1757-61 for damages for its failure to deliver the Sixty Two Thousand and Two Hundred ($62,200.00) Dollars to Riggs & Company when the stock was made available for that purpose, which action ended in a judgment in favor of the bankrupt.

If the bankrupt had any action or claim against Spence growing out of the purchase of this stock, that cause of action grew out of the sale of the stock to Spence and would be a compulsory counter-claim under Rule 13(a) 28 U.S.C.A., which contains the following:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * * ."

In the case of Switzer Bros. Inc. vs. Lochlin, 207 F. 2d 483, the court at page 488 said:

> "If the counterclaim is compulsory, it must be presented in connection with the main suit and, upon failure to do so, the claimant is barred from seeking the same relief in an independent action. Failure to file the counter-claim is res judicata of the relief which might have been obtained thereby."

In the case of Firemen's Insurance Company of Newark vs. L. P. Stewart & Bro., Inc., 158 Atl.Rep.2d 675, where the question of a compulsory counterclaim was passed upon, Judge Hood in the opinion of the court at page 677 made the following statement:

> "Crusty's claim against Steuart, the right now being asserted by the subrogees, obviously existed when Crusty was served with the third-party complaint and obviously its claim arose out of the same occurrence that was the subject matter of Steuart's claim. Thus Crusty's claim was a compulsory counterclaim and it was not asserted." * * * whenever a compulsory counter-claim is not pleaded in an action when it should have been pleaded, the judgment entered in that action is clearly res judicata as to the merits of the unpleaded counterclaim." United States vs. Eastport Steamship Corp., 2 Cir.,255 F.2d 795, 805."

In October, after the litigation had ended, the bankrupt released Fifty Thousand ($50,000.00) Dollars of the Sixty Two Thousand and Two Hundred ($62,200.00) Dollars, and the records of the bankrupt will disclose that at no time prior to October of 1963 did the bankrupt carry this account as an asset of the Corporation.

The escrow account in the First National Bank of Arlington was finally set aside and remained so allocated since September 16, 1959, almost five (5) years before Balogh & Company was adjudicated a bankrupt, and comes within Title 11, Section 96(e)(4).

The counterclaim of the bankrupt in the matter of Spence against it, being Civil Action Number 2997-63, is without any basis in fact. The depositions of Stephen E. Balogh, the President of the bankrupt firm, taken on February 21, 1964 and April 10, 1964, clearly

disclose that the bankrupt had no right of action against Spence for damages for the matter claimed therein, and it would appear that this part of the counterclaim was also a matter which should have been made a part of the litigation contained in Civil Action Number 1757-61.

In the original action of Spence against Balogh & Company, Civil Action Number 1757-61, the bankrupt made numerous tenders of Nineteen Thousand ($19,000.00) Dollars, contending that that was only Spence's share of the Sixty Two Thousand and Two Hundred ($62,200.00) Dollars, and that other doctors interested therein were entitled to the balance of the funds.

There is attached hereto a memorandum for a reference to various parts of the record in Civil Action Number 1757-61 and Civil Action Number 2997-63.

It is respectfully requested that the rule to show cause be dismissed and that an order be entered herein releasing the Twelve Thousand Two Hundred ($12,200.00) Dollars and directing the First National Bank of Arlington to pay over to William T. Spence the sum of Twelve Thousand Two Hundred ($12,200.00) Dollars.

Cornelius H. Doherty
1010 Vermont Avenue, N.W.
Washington, D.C.
Attorney for William T. Spence.

[Certificate of Service Omitted in Printing]

MEMORANDUM

On August 3, 1959, an amended underwriting agreement was in full force and effect between the Northern Virginia Doctors Hospital Corporation and Balogh & Company in which Balogh & Company as the distributor became the exclusive agent for the sale of the stock of Northern Virginia Doctors Hospital Corporation at $10.00 per share, out of which the Hospital Corporation was to pay Balogh & Company 15%.

On August 3, 1959, Dr. William T. Spence purchased 6220 shares of the stock for the sum of $62,200.00, and on the 6th day of August, 1959, a certified check, in the sum of $62,200.00, was delivered to Balogh & Company.

On the morning of August 4, 1959, the Hospital Corporation cancelled Balogh's contract and he was unable to deliver the stock and under date of September 16, 1959, the $62,200.00 was placed in an escrow account in the First National Bank of Arlington, Virginia (J. A. 190).

The following are excerpts from the depositions and/or transcript of the testimony of Balogh covering the matter of the escrow agreement and his claim against Spence:

Balogh testified, in the action of Spence, et al, against the Northern Virginia Doctors Hospital Corporation, in the Circuit Court of Arlington County, on September 29, 1959, covering the matter of any claim for commission at page 58 of the transcript of the testimony in that cause as follows:

> Q How much, sir, would you have gotten if the stock commitment of the corporation with these intervenors had been carried through, sir?

A On the 6,400 shares I made a verbal promise to the Doctors Hospital. This is purely sentimental on my part, because on the basis that I always thought a great deal of this organization and I believed that medical institution is needed. I promised the directors that my share of share of the commission will be returned in the form of a donation to the corporation, so I would not withhold any commission on that 6,400 shares in order to expedite the closing.

Q How much did you bill Riggs for the deal you did put there?

A Fifteen per cent.

Q How much is that?

A In accordance with this underwriting I had to bill 15 per cent of $64,000.

Q That's about $9,000, roughly?

A That is right, $9,000.

Q So, if the commitment of the corporation went through you would get nothing, is that right? You would give it back to the corporation?

A I would have given a donation of $9,000 to the corporation.

* * * * *

On page 61 Balogh testified as follows:

A My agreement with the Doctors Hospital still holds, Mr. Counsel, that all the doctors who purchased the stock I will not charge any commission to any of them, and that holds for this sale and the past sale and all of the sales, including what the plaintiffs represent over here, because I am speaking of the institution. There will be no charge.

In the case of William T. Spence v. Balogh & Company, Civil Action No. 1757-61, on page 7, the pre-trial order stated that the $62,200.00, which plaintiff and other doctors tendered to defendant on August 6, 1959, was

currently maintained by the defendant in a special account in the First National Bank of Arlington, Virginia, and none of the doctors ever demanded return of any part of the $62,200.00 and plaintiff has refused an offer of judgment for his share of the funds.

On page 182 of the transcript of testimony (J. A. 43), Walter J. O'Donnell, a witness for Balogh & Company, President of the First National Bank of Arlington, Virginia, made the following statement:

> Q Mr. O'Donnell, these funds that are in escrow, the $62,200, could they be taken out by Balogh & Company? A. They could be withdrawn by Balogh & Company for the purpose of paying for 6220 shares of stock, and for that purpose only. However, the deposit is in the name of Balogh & Company.
>
> Q Was that the way it was held in your bank from the 15th of April through the 25th of April, 1960? A. It has been held that way in the bank from the day the deposit was made.
>
> Q It hasn't been changed in any way? A. It hasn't been changed in any way.

Anthony B. Cuviello, Esquire, the former attorney for Balogh & Company, called as a witness for Balogh & Company, testified, at page 269 of the transcript of the proceedings, as follows:

> Now I wasn't interested in the Hospital Corporation as such. I was interested in Mr. Balogh and his corporation. I was interested in protecting his rights at that time. And as far as I was concerned, this letter from Mr. Aquilino was not satisfactory for me to advise Mr. Balogh to turn over this large amount of money, which was ostensibly in an escrow type arrangement.
>
> I felt that he had a fiduciary liability as to the funds, because, as I understand, they were only to be used for one purpose only, and that is to pick up these shares of stock.

I just felt I wasn't going to allow him to turn over the funds when there was no assurances, at least to me, that these shares were actually going to be transferred.

Balogh, as a witness for Balogh & Company, was questioned by his attorney, commencing at page 470 of the transcript (J. A. 145), testified as follows:

> Q Are you referring to Defendant's Exhibit 20, a letter from Mr. O'Donnell to you (handing)? A. Yes, sir. This is the letter which was based upon a discussion between our atto rney, Mr. Cuviello, and myself. I called Mr. Walter O'Donnell and informed him that we will be depositing the entire $62,200 into an escrow account, because, as I understood, if we put this in escrow, --
>
> Q As a consequence of your receiving this letter, you did in fact put the money into that escrow account? A. Yes.
>
> Q Has there been any time since the time you have deposited this money in that escrow account that Dr. Spence or any of his colleagues have made a demand on you for the return of that money? A. No sir,
>
> Q Have there been time s when you have offered them the money? A. Two or three times, through our attorney, it has been offered, to liquidate this fund, because it is a liability to us.
>
> Q By "liability," do you mean you have to give it special treatment on your financial statements? A. On our monthly statements we have to carry this as a counter account or liability account, because we are custodians of this fund.

Defendant's exhibit No. 20 appears on page 190 of the joint appendix covering a letter between the First National Bank of Arlington and Balogh & Company covering the escrow agreement.

On page 228 of the joint appendix there appe ars the statement of the trial judge as follows:

"That money was being held in escrow pending the outcome of the Virginia litigation."

On page 528 of the transcript of the proceedings, in Civil Action No. 1757-61, Alan Cole, Esquire, attorney for Balogh & Company, stated:

"And I might say, if Mr. Doherty is prepared to give us releases for $62,200.00 we will give him the money this afternoon. There is no issue in this case about that."

In the matter of Spence v. Balogh & Company, Civil Action No. 2997-63, pending now, the deposition of Stephen E. Balogh was taken on Friday, February 21, 1964, and on page 18 of that deposition Balogh stated that the $62,200.00 was held in an escrow account in the name of Balogh & Company in the First National Bank of Arlington, and further stated that Anthony J. Cuviello, the corporation attorney, had advised him to do that and wrote him a letter stating that it should be put in a segregated account and not co-mingled with the Company's daily operational funds, and on page 19 of the deposition stated that he had released $50,000.00 to the bank and the balance of it, $12,200.00, was still there; that he wanted to keep the $12,200.00 on the Corporation's segregated account as a contingent receivable.

On page 21 of the same deposition, Balogh stated that he could not release any of the money until the litigation was over.

On page 27 he stated that the $62,200.00 was a liability which they had to carry because it wasn't our money. It was a contingent liability.

On page 29 he stated that regardless of how much cash a brokerage house has on hand it is not an asset.

On page 36 of the deposition Balogh admitted that he had $62,200.00 that belonged to Spence and his group and that the $62,200.00 was given to him for the purpose of buying stock.

As to Balogh's claim against Spence, as set forth in the counter-claim filed in Civil Action No. 2997-63, at page 45 of his deposition of February 21, 1964, he stated that he personally did not recollect anything that Dr. Spence said against him; at page 47 he stated that he had the highest regard for Spence and that when he was talking about Spence he was talking about the repeated litigation that his counsel was launching against him on Spence's behalf.

At page 52 of his deposition he stated that he had letters in his files from various doctors who wrote about Balogh & Company but admitted that none of these letters were from Spence, Dolan, Hazel or Schwartz.

[Caption Omitted in Printing]

ANSWER OF THE FIRST NATIONAL BANK OF ARLINGTON TO THE ORDER TO SHOW CAUSE

COMES NOW the First National Bank of Arlington, by counsel, and for answer to the Order to Show Cause Why the Escrow Deposit in the First National Bank of Arlington Should Not Be Turned Over to the Trustee says as follows:

1. The allegations of paragraphs 1, 2, 3 and 4 of the Motion to Enjoin in this case are admitted.

2. The allegations of paragraphs 5, 6 and 7 of the said Motion are denied.

FOR FURTHER ANSWER to the Order to Show Cause, the First National Bank of Arlington says as follows:

3. That heretofore there was filed in the Circuit Court for Arlington County, Virginia, a certain Cause involving the purchase of stock in Northern

Virginia Doctors' Hospital Corporation, the same being Chancery Cause #10899.

4. That William T. Spence, and other physicians (hereinafter referred to collectively as Spence) had offered to purchase 6220 shares of stock in the said corporation for $62,200.00.

5. That Balogh & Co. was the broker purporting to act with respect to the sale of the said stock to Spence.

6. That the matter of the purchase of the said stock by Spence became involved in the litigation aforesaid, and the $62,200.00 which Spence had put up for the purchase of the stock was placed by Balogh & Co. in an escrow account to be held by the First National Bank of Arlington pending the outcome of the litigation.

7. That the said litigation has been finally terminated with the result that the stock was not able to be delivered to Spence.

8. That in December, 1963, $50,000.00 of the funds being held in the said escrow account were authorized by Balogh & Co. to be released to Spence.

9. There remains on deposit with this bank the sum of $12,200.00 of the said escrow account.

10. This bank is not advised as to what arrangements there may be between Spence and Balogh & Co. with respect to the ownership of the said funds beyond that which has been heretofore alleged, and further says that it is holding the said funds pending the further order of this Court.

Plea of Set-Off

The First National Bank of Arlington further says that if the said funds are the property of Balogh & Co., then it is entitled to a set-off against the said funds in the amount of $9,000.00, together with interest at 6% per annum from January 1, 1964, due by a note executed by Stephen E. Balogh, which said note, while in the form of a personal obligation of Stephen E. Balogh, is claimed by Stephen E. Balogh to be a corporate obligation of Balogh & Co.

FIRST NATIONAL BANK OF ARLINGTON

By _____
Counsel

PETER J. KOSTIK
Counsel for First National Bank of Arlington
2046 Wilson Blvd., Arlington, Virginia

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF BALOGH & COMPANY, INC., BANKRUPT	In Bankruptcy No. 69-64

Room 2104, U. S. Court House

Washington 1, D. C.

Thursday, October 22, 1964

The above entitled matter came on for hearing for the Rule to Show Cause why the escrow deposit in the First National Bank of Arlington should not be turned over to the Trustee, before Honorable John Bresnahan, Referee in Bankruptcy, at 10:00, a.m., Thursday, October 22, 1964.

APPEARANCES:

EDWARD J. MCGRATH, ESQ.,
The Trustee

SAMUEL M. GREENBAUM, ESQ.,
For the Trustee

CHARLES ABELES, ESQ.,
For the Bankrupt

CORNELIUS H. DOHERTY, ESQ.,
For Dr. William T. Spence

PETER J. KOSTIK, ESQ.,
For the First National Bank of Arlington

-- o --

MR. KOSTIK: I would like to get one thing straightened out. Of course, I have been going on under the impression that these funds now belonged to--or the right to have them--belonged to Doctor Spence entirely.

I was not aware of the answer on something to which you have referred. I know that in some previous litigation there was some question about giving Doctor Spence a certain amount of money and letting him out of the case.

But, I'm proceeding on the Show Cause Order here, Your Honor. If there are other parties who have an interest, they are entitled to be heard.

Now, Spence represents that interest. If Mr. Doherty represents that entire interest, then I think we can go ahead. But I feel that if the other doctors have an interest in this thing, they would have a right to assert their claim in this same proceeding.

MR. DOHERTY: May I answer that?

MR. KOSTIK: Yes.

MR. DOHERTY: Any right they have has been released to the First National Bank, to Walter O'Donnell, by a signed paper quite some time ago, that it all belongs to Spence, whatever it may be.

MR. KOSTIK: Well, just so we have it for the record

here, this entire fund as far as the other doctors are concerned, belongs to Spence; and you're authorized to go ahead on that basis?

MR. DOHERTY: That's right. I'm sure that Mr. O'Donnell has that over there, because I saw the thing that was signed by all the doctors.

MR. GREENBAUM: Mr. Doherty, one further point that you stated in your argument that I want to emphasize. The suit originally filed in the Circuit Court of Arlington that went to the higher court of Virginia against Northern Virginia Doctors' Hospital Corporation, was a suit by Doctor Spence and the other doctors as plaintiffs; not by Spence as an individual?

MR. DOHERTY: No, because the testimony at the trial over there was that Balogh and Company sold--Balogh testified that it was sold to Spence himself and to no one else. And the appeal was just by Spence.

MR. GREENBAUM: Was the Northern Virginia Doctors' Hospital granted a judgement against the other three doctors that they were not proper party plaintiffs?

MR. DOHERTY: No, just that the matter was dismissed and Spence took it to the Court of Appeals.

MR. GREENBAUM: Spence alone took it to the Court of Appeals?

MR. DOHERTY: Right.

Court. I respectfully refer Your Honor to the first paragraph of Doctor Spence's answer in which--if I may, I will read--it is stated:

"William T. Spence through his attorney, Cornelius H. Doherty, for answer to the Order to Show Cause why the escrow deposit in the First National Bank of Arlington should not be turned over to the Trustee and for an Order directing the Trustee to release the escrow fund of $12,200.00..." In other words, there is a prayer for affirmative relief here. "...to William T. Spence and (2), for a dismissal of the counter claim of the bankrupt in the case of Spence versus Balogh and Company, Civil Action Number 2997-63, and for reasons therefor submits the following:"

THE REFEREE: Let me stop you there. From reading these pleadings, I didn't understand that there was any objection from you gentlemen to summary jurisdiction, is that right?

MR. GREENBAUM: No, there isn't.

MR. DOHERTY: The only thing that we thought would be before it--at least sofar as Spence is concerned--was the $12,200.00 in an escrow account? If it wasn't in an escrow account, it should be released to Spence or back to the bank and let the litigation go on whatever way they wanted. There is only one issue here: Is that $12,200.00 in an escrow account? If it is, that's the end of it.

THE REFEREE: You have no objection to summary jurisdiction?

MR. DOHERTY: No, I don't.

THE REFEREE: I understand that you don't have any objection, Mr. Kostik?

MR. KOSTIK: We have the funds, Your Honor. We are willing to pay them--to do whatever is proper the Court says we should pay them if we don't have a claim on it.

THE REFEREE: Well, I assumed that. If you don't plead to the summary jurisdiction, you consent to it.

MR. DOHERTY: I plead ignorance anyway. But it wouldn't make any difference sofar as that is concerned, Your Honor, because the fund, I was going only on the fact that it was an escrow account.

THE REFEREE: You want these issues settled?

MR. DOHERTY: Just that one issue. That's all there is to it.

MR. GREENBAUM: Or the counter claim of which we maintain there may be some part valid. We admit the major portion of it as such.

MR. DOHERTY: As I understand this under Title 11, Section 96(e)4 which I referred to before, the money which is held in escrow in such a way that it is separated from the

actual funds of the bankrupt, under those circumstances, they are not a part of the assets of the bankrupt.

THE REFEREE: I was just trying to shorten Mr. Greenbaum's argument here. Not going into the merits of what phases that we have in litigation and directing your attention to the fact that in the event you do not plead to the summary jurisdiction, you consent to it, do I understand from these pleadings that you want, and that you know that you have consented to the summary jurisdiction?

MR. DOHERTY: No, I didn't understand it that way. I thought it was just in answer to the Rule to Show Cause and to set forth the facts. Your Honor sent out this Rule to Show Cause, and I answered it under the impression that it was a question whether you would decide whether or not it was the funds belonging to the escrow.

THE REFEREE: That's what it was exactly, and by answering, both of you have consented to the summary jurisdiction of the Court to make a determination of these issues before me which would carry forward if I decide that way.

MR. DOHERTY: Subject to what I put in there, of course, about that, Your Honor.

THE REFEREE: All right. You go ahead, Mr. Greenbaum.

MR. GREENBAUM: Well, under those conditions, I was just going to demonstrate the right of this Court to take summary jurisdiction, but I think that pretty much concludes it.

I will say this: That it was not intended this Court should reach decisions on merit today, and I would presume that the issue as to the merit would be specifically set, unless there is nothing more to be added in the way of testimony or --

MR. ABELES: May I speak, Your Honor.

THE REFEREE: Certainly.

MR. ABELES: I'm Charles Abeles representing Mr. Balogh personally. If Your Honor should take, as you call it, summary jurisdiction over this fund, does this foreclose Mr. Balogh personally from adhering to the position of the Arlington bank that there should be a setoff here? In other words, that this was an obligation of Balogh and Company itself rather than Mr. Balogh personally, because if that is the case, Your Honor, we would have to resist it.

THE REFEREE: That's not a matter of issue before me this morning. It is something you will have to determine as to what you are going to do if we move along here. I don't know what his position is going to be. I don't know what the position of these gentlemen is going to be right now.

[Caption Omitted in Printing]

ORDER

1. Decreeing summary jurisdiction on all issues in C. A. 2997-63, U. S. District Court for the District of Columbia, and attachment action No. 9686, Circuit Court of Arlington County, Virginia, and all counterclaims or defenses thereunto asserted;
2. Fixing time for submission of stipulated statement of facts, or, in the alternative, setting hearing for taking of testimony on all issues;
3. Taking under advisement prayer requesting turnover of Balogh & Company escrow deposit ($12, 200. 00) in the First National Bank of Arlington;
4. Withholding entry of permanent injunction upon assurances of counsel for parties in interest;
5. Denying request of Stephen E. Balogh for further time to file response.

At WASHINGTON, D. C., this 27 day of October, 1964.

This matter came on for hearing on the 22nd day of October, 1964, upon the Trustee's "Motion to Enjoin (1) William T. Spence, (a) Plaintiff, Civil Action 2997-63, United States District Court for the District of Columbia, and (b) Plaintiff, Attachment Action No. 96-86, Circuit Court of Arlington County, Virginia, and to Enjoin (2) First National Bank of Arlington, and (3) for Order to Show Cause why the Escrow Deposit in said Bank should not be Turned over to the Trustee", and the Order to Show Cause issued thereupon under date of September 17, 1964, whereby William T. Spence, the First National Bank of Arlington, and Stephen E. Balogh, as respondents, were directed to show cause at the aforesaid hearing (1) why William T. Spence, his agents, attorneys and representatives, should not be permanently enjoined from further pursuing his claims against the bankrupt and others as

set forth in Civil Action No. 2997-63 in the United States District Court for the District of Columbia, and in attachment action No. 96-86 in the Circuit Court for Arlington County, Virginia, and why the claims subject of the said civil actions should not be asserted in this proceeding for summary adjudication by this court; (2) why the First National Bank of Arlington, its agents, attorneys and representatives, should not be enjoined from setting off or attempting to set off any claim it asserts against the bankrupt against such property, assets, deposits, or credits of the bankrupt in said bank, and why it should not assert said claim for summary adjudication by this court in the above-captioned proceeding; and (3) why such property, credit, assets, or deposits of the bankrupt corporation, or belonging to the bankrupt corporation for the benefit of its customers and creditors on deposit in the First National Bank of Arlington, should not be turned over to the Trustee in Bankruptcy herein for deposit as an asset of the bankrupt estate for the benefit of its creditors, and whereby said respondents were further directed, if they opposed the granting of the relief prayed for in the said Motion, to file written responses thereto on or before five (5) days before the date of hearing on said motion; and upon consideration of the timely filed (1) Answer of William T. Spence to the Order to Show Cause and for an Order Directing the Release of the Funds to William T. Spence, and the (2) Answer of the First National Bank of Arlington to the Order to Show Cause, and the failure of Stephen E. Balogh to file any response, timely or otherwise, with this court to said Motion as directed in said Order to Show Cause; and upon the oral arguments of counsel for the respective respondents, i.e., Cornelius

H. Doherty, Esq., attorney for William T. Spence, Peter J. Kostik, Esq., attorney for First National Bank of Arlington, and Charles C. Kieffer, Esq., attorney for Stephen E. Balogh, and counsel for the Trustee, made to this court at the time of said hearing, this court finds and concludes that:

(1) As no timely objection has been made or filed by any respondent, this court should assume summary jurisdiction of the issues between the several respondents and the Trustee in Bankruptcy as framed in Civil Action No. 2997-63 in the United States District Court for the District of Columbia in which Balogh & Company is named defendant, and attachment action No. 9686 in the Circuit Court for Arlington County, Virginia, in which William T. Spence is plaintiff and the bankrupt corporation, Stephen E. Balogh, and the First National Bank of Arlington are named defendants, and all defenses and counterclaims and set-offs therein asserted;

(2) The aforesaid civil actions should continue to be enjoined by this court until further order of this court, or, in lieu of continuing the injunction, the assurances of counsel for parties in interest should be accepted that no further action will be taken in or in connection with (a) the afore-described court actions, or (b) the sum of $12,200.00 deposited in the First National Bank of Arlington in an account designated "Balogh & Company Escrow Account", until further order of this court;

(3) The sum of $12,200.00 on deposit in the First National Bank of Arlington in the Balogh & Company Escrow Account shall remain therein subject to further order of this court, and the turnover thereof as petitioned for by the Trustee should be taken under advisement;

(4) Counsel for parties in interest should undertake to prepare a stipulated statement of pertinent and material facts for filing with this court on or before November 30, 1964, upon wh ich this court can undertake (a) to adjudicate summarily the entitlement of parties in interest to the funds of $12,200.00 as aforesaid, and (b) to adjudicate all other issues raised in the said complaints, defenses, and/or answers and counterclaims asserted in said civil actions. In the event that counsel are unable to reach an agreed stipulation as to pertinent and material facts for consideration by this court on or before November 30, then on said date this court shall fix a date for hearing to take relevant and pertinent testimony on the issues;

(5) The oral request of Stephen E. Balogh, respondent, for extension of time to file a response to the Order to Show Cause should be denied for reason that the said Stephen E. Balogh and his counsel were each duly and timely served, at appropriate addresses, a certified copy of the Motion for Order to Show Cause and the order of September 17 issued thereon directing the filing of responses in the manner aforestated.

WHEREUPON, IT IS

ORDERED that all further proceedings and issues between the Trustee in Bankruptcy , William T. Spence, the First National Bank of Arlington, and Stephen E. Balogh, relating to issues raised in complaints, defenses, and counterclaims, in Civil Action 2997-63, United States District Court for the District of Columbia, and attachment action No. 9686, Circuit Court for Arlington County, Virginia, and claims to the sum of $12,200.00 on deposit in the First National Bank of Arlington, be and the same hereby are

decreed to be subject to the summary jurisdiction of this court; and it is further

ORDERED that no injunction will issue restraining further action in said court actions or in reference to the disposition of the fund in the First National Bank of Arlington in the escrow account of Balogh & Company upon the assurances of counsel for parties in interest that no further action will be undertaken without prior leave or authority of this court; and it is further

ORDERED that subject to the jurisdiction and until further order of this court the sum of $12,200.00 now on deposit in the First National Bank of Arlington in the name of Balogh & Company Escrow Account shall remain therein; and it is further

ORDERED that counsel for parties in interest shall undertake to prepare on or before November 30, 1964, and file with this court a stipulated statement of pertinent and material facts and frame the issues for adjudication by this court. Provided, however, that in the event said stipulation is not filed with this court on or before November 30, that at said time, this court shall set a hearing to take the testimony and evidence relating to said issues for adjudication by this court; and it is further

ORDERED that the oral request of Stephen E. Balogh, made at time of hearing, for further time to file his response to the Order to Show Cause, be and the same hereby is denied; and it is further

ORDERED that the Clerk of this court shall serve a copy of this order by first class mail, postage prepaid, upon:

William T. Spence
3715 Idaho Avenue, N. W.
Washington, D. C.

First National Bank of Arlington
801 North Glebe Road
Arlington, Virginia

Stephen E. Balogh
2144 California Street, N. W.
Envoy, Apt. #704
Washington, D. C.

Cornelius H. Doherty, Esq.
Attorney of record for William T. Spence
1010 Vermont Ave., N. W.
Washington, D. C. 20005

Peter J. Kostik, Esq.
Attorney for First National Bank of Arlington
2046 Wilson Blvd.
Arlington, Virginia

Kieffer & Maroney
Attorneys for Stephen E. Balogh
Suite 1037
1875 Connecticut Ave., N. W.
Washington, D. C.

Copys sent to the above-named
on the 22th day of Oct., 1964
Nancy A Dimonsky
Clerk

John A. Brennan
Referee in Bankruptcy

F I L E D

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DEC 1 - 1964

AGREED STATEMENT OF FACTS

JOHN A. BRENNAN
REFEREE IN BANKRUPTCY

In accordance with the order of this Court under date of October 22, 1964, the Trustee, Edward J. McGrath, Esquire, through his counsel, Samuel M. Greenbaum, and William T. Spence, through his counsel, Cornelius H. Doherty, submit the following excerpts from the testimony given by Stephen E. Balogh, William T. Spence and others in the case of Dr. John T. Hazel, et al v. Northern Virginia Doctors Hospital Corporation, a Corporation, Chancery No. 10899, in the Circuit Court of Arlington County, Vir-

ginia, the case of William T. Spence v. Balogh & Company, Inc., Civil Action No. 1757-61, in the United States District Court for the District of Columbia, and in the case of Balogh & Company v. Northern Virginia Doctors Hospital Corporation, Civil Action No. 2334, pending in the United States District Court for the Eastern District of Virginia, Alexandria, Virginia, and refer to certain exhibits pertinent to this matter.

The first item to be referred to covers the purported purchase of 6220 shares of stock of the Northern Virginia Doctors Hospital Corporation on the 3rd day of August, 1959.

Under date of August 3, 1959, Balogh & Company, under an underwriting agreement which it had with the Northern Virginia Doctors Hospital Corporation covering the sale of 16,552 shares of its stock, which was being sold under a public offering at $10.00 per share, with the underwriting commission being 15% to be deducted from the $10.00 per share, sold to William T. Spence 6220 shares of the stock of the Northern Virginia Doctors Hospital Corporation.

The testimony of Stephen E. Balogh, the President of Balogh & Company, testifying in the case of Dr. William T. Spence, et al v. Northern Virginia Doctors Hospital Corporation, on September 29, 1959, at page 41 of the printed record of the proceedings, is, in part, as follows:

> "Q. Mr. Balogh, did there come a time that day or sometime that you sold this 6,220 shares of stock?
>
> "A. No, sir. I had not sold the shares until the morning of the 4th of August. I had a verbal order on or about 5:15 p.m., at my home.
>
> "Q. Of August 3rd?

"A. August 3rd. May I mention the name?

"Q. You sold the stock and there was a firm offer made to you at that time?

"A. It was a firm offer made to me.

"Q. Who was it made by?

"A. By Dr. Spence by telephone to my home. And he asked me if there are any shares left, that he and his friends, a group of doctors--he didn't name names--would like to buy the outstanding unsold shares, and he asked me to confirm the sale to the First National Bank of Arlington naming Mr. Walter O'Donnell as agent, and no names were given to me.

"I told him it was impossible to confirm this sale on August 3rd in my home, but I will be back in my office the first thing--I think it was Tuesday morning--August 4th, and the sale was completed, the confirmation was delivered to Mr. O'Donnell and with that on August 4, we completed the public issue which sold out 16,552 shares.

"Q. I show you this confirmation dated August 4, 1959,. and ask you if that is the confirmation that was sent out to Mr. O'Donnell (handing the document to the witness)?

"A. Yes, sir. This is a copy.

"Q. Under this, the person who bought 6,220 shares had until the 10th day of August 1959 in which to pay cash. Is that right?

"A. They had four calendar days to settle.

"Q. Does it show when that was paid, $62,200?

"A. On August 6th, two days after the purchase.

"Q. 1959?

"A. Yes, sir."

On page 65 of the same record is the further examination of Mr. Balogh:

"Q. That night you got the call from Dr. Spence, he ordered it for the account of Mr. O'Donnell at the First National Bank?

"A. As an agent, yes.

"Q. Whose agent was he?

"A. There were no names given to me. It was a hurried telephone call, I was on my way to the reserve camp, and I said to Dr. Spence, 'I cannot expedite any of your order tonight. Tomorrow morning it will be confirmed.' That is all I knew, we were designating the First National Bank, respectively Mr. O'Donnell, as our agent.

"Q. Whose agent? You said, 'Our agent'?

"A. He purchased it. I have known Dr. Spence for a number of years. He is a good friend of mine.

"Q. I know him, too, but I am not criticizing Dr. Spence. I am asking you whose account he bought the stock for?

"A. For all practical purposes, he gave me his oath he is a good customer for $62,000. I accepted him as the customer.

"Q. You accepted him as the customer for the account of the bank?

"A. He was the man to purchase the stock and he designated the bank as the paying agent.

"Q. Tell me one thing: If that is so, why did you confirm it to the bank instead of Dr. Spence?

"A. Because that is the instruction I received from the customer. The customer says, 'You send this to the Riggs National Bank.' or send it someplace else, whoever is the collection agent. I may be the agent for one of the accounts. I am following the instructions of the customer."

On page 68 of the same record is the following:

"Q. What was it you wanted to say? Please explain.

"A. The $62,200, we never deposited any check to the issuer's account until we give the transfer instructions to the transfer agent or the issuer. We pay for the purchased shares when we give the transfer in-

structions, and we have deposited with the Riggs National Bank the $62,200 with the transfer instructions after. After they refused the check we had to put it in an excrow account."

On page 78 of the same record is the following:

"A. On the morning of August 3rd, 1959 I tabulated that the left over total shares were 6,220 unsold, and selling of those shares completed the public offering.

"Q. And that was the 6,220 shares of stock that was sold to--

"A. To Dr. Spence on his order of August third.

"Q. And confirmation was sent to Walter O'Donnell?

"A. As agent, yes, on August fourth. We have been very careful and we have to be careful when underwriting syndicate shares, Mr. Counsel. We cannot oversell any of those shares.

"Q. The 6,220 shares brought up your aggregate to?

"A. 16,552."

On page 347 of the transcript in the proceedings of the Circuit Court of Arlington County, Virginia, under date of October 1, 1959, William T. Spence testified as follows:

> "You were the leading spirit behind getting Dr. Dolan, Dr. Schwartz and Dr. Hazel and Dr. Bastien into this thing?
>
> "A. Yes, I believe that is correct. We all talked about it over a period of years.
>
> "Q. I don't mean about that. I am talking about this contract or the purchase of stock from Balogh & Company?
>
> "A. Yes."

On page 12 of the transcript of the testimony of the proceedings in the United States District Court for the District of Columbia, William T. Spence testified, in part, as follows:

"Q. At the time that you bought this stock, the 6220 shares, did you have any understanding with anybody as to their receiving any particular amount?

"A. No; that was a very loose arrangement. I had spoken to several doctor friends of mine who were reputable doctors, reliable people, who I felt would be proper people to have a say in this hospital, and they all agreed with me that if I obtained the 6220 shares that they would take some of it. There was never any indication as to the exact amount. There was never any indication as to how many people we would distribute this among. There was never any set agreement on any of the amounts of how much it would cost or how many shares they would take. It was my purpose to buy these shares and then people that I felt would be good for the hospital I would let have some of them, but I was solely responsible and still am."

Commencing on page 37 of the transcript of the testimony in the matter of Balogh & Company v. Northern Virginia Doctors Hospital Corporation in the United States District Court in Alexandria, the following statements were made:

"THE COURT: You mean a sale was made to Dr. Spence?

"MR. COLE: That is correct and his colleagues."

* * * * *

"THE COURT: Do you intend in this suit to show that a sale of Doctors Hospital stock was, in fact, and in law, made to Dr. Spence on August 3 or 4, whatever the date was?

"MR. COLE: We intend to show that a sale was made to Dr. Spence on August 3, and that there was a failure to deliver the stock under that. It is not a complicated factual showing but an essential one."

On page 44 of the District Court proceedings in Alexandria, with Mr. Balogh testifying, is the following:

"BY MR. COLE:

"Q. On the afternoon of August 3, 1959, did you have a telephone conversation with Dr. Spence?

"A. Yes.

"Q. Can you state what the substance of that telephone conversation was?

"A. I had two telephone conversations.

"Q. Let us refer to the last of the two.

"A. On or about 5:15 that afternoon he called me, I was already at my home, and asked me whether there are any unsold Northern Virginia Doctors Hospital shares out of the original public issue.

"Q. And what did you reply to him at that point?

"A. I told him that as of 2:30 that afternoon we cancelled 6,220 shares from accounts of people who indicated before their interest and their are 6,220 shares unsold.

"Q. And what did Dr. Spence reply to you?

"A. He immediately said that he and a number of his fellow doctors whom he named, four or five of them, would like to purchase those shares.

"Q. Will you go on with the substance of the remainder of the conversation, if you can recall the words give them.

"A. I immediately told him, being a friend of Dr. Spence, that 'you are a proud owner of 6,220 shares and I will confirm the completion of this order tomorrow morning on the fourth when I go to the office.' In other words, the clerical work, the actual issuance of the confirmation will take place, but as far as I was concerned he understood perfectly.

"THE COURT: Don't tell me what he understood. Tell me what you said.

"BY MR. COLE:

"Q. What did you say to Dr. Spence?

"A. He said: 'I will buy it,' after I told him that the shares are available for purchase.

"Q. And you completed your conversation in what fashion?

"A. With the perfect understanding on both sides that Dr. Spence and his -

"Q. What were the words with which you completed that conversation?

"THE COURT: What did you tell him when, 'I will buy'?

"THE WITNESS: I said I hereby confirm the sale to you. I sold it to you.

"MR. PURCELL: Pardon me. The witness a moment ago said he confirmed the sale the next day. Now he says quote, 'I hereby confirm to you." What does he mean?

"THE WITNESS: The verbal -

"THE COURT: Just a minute. You can ask him that on cross examination. It is in the record.

"Go ahead.

"THE WITNESS: As far as I was concerned, your Honor, a verbal confirmation -

"MR. COLE: Excuse me, Mr. Balogh, we are not interes ted now in your evaluation of the conversation. We want only the colloquy between yourself and Dr. Spence on that telephone that evening.

"THE WITNESS: According to my best recollection he called, asked me how many shares are available for purchase. I named the 6,220 shares. He said, 'I and a number of the doctor friends of mine would like to purchase those shares.' And as I repeat myself, I again said: 'Bill, you are the proud owner of 6,220 shares, and I sold these to you. The written confirmation will be sent to you tomorrow morning from the office.' This conversation took place in my own home."

On page 58 of the proceedings in the United States District Court at Alexandria is the following:

> "THE COURT: All right. You have that, but it is not this man's money. If it is anybody's money, it belongs to the First National Bank or Spence. They put up the $62,200.
>
> "MR. COLE: Less a commission, Your Honor, of 15%.
>
> "THE COURT: That would be $9,000.
>
> "MR. COLE: That is correct, Your Honor, and had it not been for that money sitting in that bank, we would have earned $9,000 plus, had this transaction gone through. This is one aspect to the damages to the plaintiff in this case.
>
> "THE COURT: What I am getting at is the mere fact as to whether Riggs returned the money to somebody and somebody has it in an escrow account. Suppose Spence stuck it back in his pocket. If he is liable, he is still liable, isn't he?
>
> "MR. COLE: We appreciate that. We are not asserting any liability now on the part of Spence one way or the other."

On page 111 of the transcript in the District Court in Alexandria, on the cross-examination of Stephen E. Balogh, the following proceedings were had:

> "Q. The statement at that same time, and I quote from page 36 of the testimony -- the question was asked you: 'You sold the stock and there was a firm offer made to you at that time.' Your answer was: 'It was a firm offer made to me. Question: Who was it made by?' Your answer: 'By Dr. Spence by telephone to my home, and he asked me if any shares left, that he and his friends, a group of doctors, he didn't name, would like to buy the outstanding, unsold shares, and he asked me to confirm the sale to the First National Bank of Arlington, naming Mr. Walter O'Donnell as agent and no names were given me.' You continue on: "I told him it was impossible to confirm this sale on

August 3 in my home, but I will be back in my office the first thing, I think it was Tuesday morning, August 4, and the sale was completed. The confirmation was delivered to Mr. O'Donnell and with that on August 4 we completed the public issue which sold out 16,552 shares.' I ask you if you were asked those questions and gave those answers at that time?

"A. According to my best recollection, yes, sir."

William T. Spence, called as a witness on behalf of Balogh & Company, being questioned by Mr. Cole, attorney for Balogh & Company, in the United States District Court at Alexandria, Virginia, testified, in part, commencing on page 83, as follows:

"Q. What did Mr. Balogh say to you during the course of that telephone conversation?

"A. He said the stock is sold to you. You now are the owner of 6,220 shares of Northern Virginia Doctors Hospital stock.

"Q. And after that telephone conversation was completed when did you see Mr. Balogh again?

"A. On the 6th of August at which time I went to his office with Mr. Walter O'Donnell of the First National Bank with a check for $62,200."

On cross-examination of William T. Spence, commencing at page 89 of the transcript of the proceedings in the United States District Court at Alexandria, the following proceedings were had:

"Q. Dr. Spence, you have testified that you talked with Mr. Balogh on the telephone I believe between 5 and 5:30 p.m. on August 3?

"A. Approximately.

"Q. You had talked to him on the telephone or in person prior to that time concerning this stock?

"A. Yes.

"Q. Block of stock. You have testified, I believe, to the effect that you told in this telephone conversation at 5 or 5:30 in the afternoon on August 3, you told Mr. Balogh that you desired to buy the block of stock, 6,220 shares which he had told you had become available that day; is that correct?

"A. Yes.

"Q. You were buying it on your own account or for yourself and others?

"A. I was buying it on my own account, if necessary, although I wanted to share it with others.

"Q. Now, would you just state again whether Mr. Balogh told you that he would sell you the stock? Is that what you testified to, that he would sell you the stock?

"A. I testified that I was given the stock by verbal order. I talked to him that afternoon as I testified and felt that it was -- I would be able to finance the stock and then called him at home and told him definitely I would take it, and he told me definitely it was sold to me. I bought stock from brokers many times before over the telephone, and I had no doubt it was the proper way to do it."

In the matter of the escrow agreement, the following excerpts are taken from exhibits and the transcribed testimony of various witnesses:

Defendant's exhibit No. 20, in the matter of William T. Spence v. Balogh & Company in the United States District Court for the District of Columbia, is a letter dated September 16, 1959, addressed to Mr. Stephen E. Balogh of Balogh & Company, from Walter J. O'Donnell, President, First National Bank of Arlington, Virginia, and which appears on page 190 of the joint appendix filed in the United States Court of Appeals in the case of Spence v. Balogh & Company, Inc., Court of Appeals No. 17,399:

"Dear Steve:

"In line with my discussion with Mr. Cuviello, there are enclosed two Corporate Signature Cards and a Corporate Resolution form for opening a bank account.

"I am happy that you have agreed to open an escrow account with us carrying the $62,200.00 presented to you for the purchase of 6220 shares of stock in the Northern Virginia Doctors Hospital, pending the outcome of the current litigation. This will relieve the doctor purchasers of interest charges on the money borrowed for the purchase of the stock.

"Thank you very much for your cooperation."

Walter J. O'Donnell, called as a witness by the defendant, Balogh & Company, on cross-examination, at page 182 of the transcript of the proceedings and page 43 of the joint appendix on the appeal, made the following answers to the questions presented to him:

"BY MR. DOHERTY:

"Q. Mr. O'Donnell, these funds that are in escrow, the $62,200, could they be taken out by Balogh & Company? A. They could be withdrawn by Balogh & Company for the purpose of paying for 6220 shares of stock, and for that purpose only. However, the deposit is in the name of Balogh & Company.

"Q. Was that the way it was held in your bank from the 15th of April through the 25th of April, 1960? A. It has been held that way in the bank from the day the deposit was made.

"Q. It hasn't been changed in any way? A. It hasn't been changed in any way."

In the proceedings in the United States District Court for the District of Columbia, Anthony B. Cuviello, Esquire, the former atto rney for Balogh & Company, called as a witness for Balogh & Company, testified at page 269 of the transcript of the proceedings as follows:

"Now I wasn't interested in the Hospital Corporation as such. I was interested in Mr. Balogh and his corporation. I was interested in protecting his rights at that time. And as far as I was concerned, this letter from Mr. Aquilino was not satisfactory for me to advise Mr. Balogh to turn over this large amount of money, which was ostensibly in an escrow type arrangement.

"I felt that he had a fiduciary liability as to the funds, because, as I understand, they were only to be used for one purpose only, and that is to pick up these shares of stock.

"I just felt I wasn't going to allow him to turn over the funds when there was no assurances, at least to me, that these shares were actually going to be transferred."

Stephen E. Balogh, as a witness for Balogh & Company, in the matter of Spence v. Balogh & Company in the United States District Court for the District of Columbia, commencing at page 470 of the transcript (J. A. 145) testified as follows:

"Q. Are you referring to Defendant's Exhibit 20, a letter from Mr. O'Donnell to you (handing)? A. Yes, sir. This is the letter which was based upon a discussion between our attorney, Mr. Cuviello, and myself. I called Mr. Walter O'Donnell and informed him that we will be depositing the entire $62,200 into an escrow account, because, as I understood, if we put this in escrow, --

"Q. As a consequence of your receiving this letter, you did in fact put the money into that escrow account? A. Yes.

"Q. Has there been any time since the time you have deposited this money in that escrow account that Dr. Spence or any of his colleagues have made a demand on you for the return of that money? A. No sir,

"Q. Have there been times when you have offered them the money? A. Two or three times, through our attorney, it has been offered, to liquidate this fund, because it is a liability to us.

"Q. By 'liability,' do you mean you have to give it special treatment on your financial statements? A. On our monthly statements we have to carry this as a counter account or liability account, because we are custodians of this fund."

On page 228 of the joint appendix covering the matter of Spence v. Balogh & Company, there appears the statement of the trial judge as follows:

"That money was being held in escrow pending the outcome of the Virginia litigation."

In the matter of Spence v. Balogh & Company, Civil Action No. 2997-63, pending now, the deposition of Stephen E. Balogh was taken on Friday, February 21, 1964, and on page 18 of that deposition Balogh stated that the $62,200.00 was held in an escrow account in the name of Balogh & Company in the First National Bank of Arlington, and further stated that Anthony J. Cuviello, the corporation attorney, had advised him to do that and wrote him a letter stating that it should be put in a segregated account and not co-mingled with the Company's daily operational funds, and on page 19 of the deposition stated that he had released $50,000.00 to the bank and the balance of it, $12,200.00, was still there; that he wanted to keep the $12,200.00 on the Corporation's segregated account as a contingent receivable.

On page 21 of the same deposition, Balogh stated that he could not release any of the money until the litigation was over.

On page 27 he stated that the $62,200.00 was a liability which they had to carry because it wasn't our money. It was a contingent liability.

On page 29 he stated that regardless of how much cash a brokerage house has on hand it is not an asset.

On page 36 of the deposition Balogh admitted that he had

$62,200.00 that belonged to Spence and his group and that the $62,200.00 was given to him for the purpose of buying stock.

In the action of Spence v. Balogh & Co., Civil Action No. 1757-61, filed June 5, 1961, in the United States District Court for the District of Columbia, no counter-claim was filed versus Spence covering any amount due Balogh & Co. for commissions and/or damages.

In Balogh & Co.'s action versus Northern Virginia Doctors Hospital Corporation, Civil Action No. 2334, filed in the United States District Court for the Eastern District of Virginia, at Alexandria, it claimed in its complaint, among other things, a claim for $9330.00 as a 15% commission on the sale of 6220 shares of stock to Spence, et al, which case was finally settled by the parties.

There is attached hereto a copy of a letter dated April 22, 1964, addressed to the First National Bank of Arlington, in which William D. Dolan, Raymond Schwartz and John T. Hazel consent to a filing of an answer in the Circuit Court of Arlington County of Spence v. Balogh, stating that the funds, now in question, belonged to William T. Spence.

There is also attached hereto a letter from Walter J. O'Donnell, President of the First National Bank of Arlington, under date of November 20, 1964, covering the account as it is held in the First National Bank of Arlington.

We, the undersigned counsel of record for the trustee, Edward J. McGrath, Esquire, William T. Spence and the First National Bank of Arlington, Virginia, agree that the foregoing Agreed Statement of Facts covers the sub-

stance of all statements made under oath in the various cited cases on the matter presently before this Court.

EDWARD J. McGRATH

Samuel M. Greenbaum

WILLIAM T. SPENCE
By

Cornelius H. Doherty

FIRST NATIONAL BANK OF ARLINGTON
By

Peter J. Kostik

F I L E D

DEC 29 1964

JOHN A. BRESNAHAN
REFEREE IN BANKRUPTCY

[Caption Omitted in Printing]

ADDITIONAL STATEMENT OF FACTS

In accordance with the order of this Court requiring counsel for William T. Spence to submit additional facts in accordance with the request of Edward J. McGrath, Trustee herein, which was received by counsel for William T. Spence on December 15, 1964, the following matters are submitted in accordance with that request:

1. There is attached to this statement a copy of the original opinion of the Supreme Court of Appeals of Virginia in the case of William T. Spence v. Northern Virginia Doctors Hospital Corporation, Record No. 5155, which was plaintiff's exhibit No. 9 in the matter of Spence v. Balogh & Company, Civil Action No. 1757-61.

This is the only copy counsel has and this opinion is reported in 202 Va. 478, 117 S. E. (2d) 657.

2. In accordance with request No. 2, there is attached hereto a copy of the opinion of the United States District Court, dated July 31, 1962, in the matter of Spence v. Balogh & Company, Civil Action No. 1757-61.

3. Request No. 3 is for all facts upon which Dr. William T. Spence claims to be entitled to the entire fund of $12,200.00 now on deposit in the First National Bank of Arlington, and counsel now states that to his knowledge there are no facts other than those which have previously been submitted, with the following additions:

The record herein discloses that Balogh & Company, on August 3, 1959, sold 6220 shares of the stock of the Northern Virginia Doctors Hospital Corporation to William T. Spence, and thereafter, on, to-wit, August 6, 1959, Spence assigned 800 of these shares to Dr. John T. Hazel, 1500 to Dr. Raymond Schwartz, 400 to Dr. Henry Bastien and 1620 to Dr. William D. Dolan.

Thereafter, on or about March 30, 1961, Dr. Bastien withdrew and Dr. Spence took over the obligation of the 400 shares.

The following are excerpts of testimony taken from the transcript of the case of Spence v. Balogh & Company, Civil Action No. 1757-61, which is pertinent to the information requested.

Dr. Spence, on examination by his counsel, commencing on page 11 of the transcript of testimony, stated as follows:

> "Q. There's a reference to a Dr. Bastien as one of the persons to whom certain stock was to be delivered under this letter of August 6, 1959, to Balogh & Company.

"Does Dr. Bastien have anything to do with that stock now?

"A. No; he tired of the whole business of trying to get this stock and wanted his money back, and I arranged at the Arlington Bank for him to be returned his, I believe it was a thousand dollars that he had put up, and anyway he gave it back and I took over his share of stock.

"Q. That was four hundred shares?

"A. Yes."

Commencing on page 12 of the transcript is the following:

"Q. At the time that you bought this stock, the 6220 shares, did you have any understanding with anybody as to their receiving any particular amount?

"A. No; that was a very loose arrangement. I had spoken to several doctor friends of mine who were reputable doctors, reliable people, who I felt would be proper people to have a say in this hospital, and they all agreed with me that if I obtained the 6220 shares that they would take some of it. There was never any indication as to the exact amount. There was never any indication as to how many people we would distribute this among. There was never any set agreement on any of the amounts of how much it would cost or how many shares they would take. It was my purpose to buy these shares and then people that I felt would be good for the hospital I would let have some of them, but I was solely responsible and still am.

"MR. DOHERTY: That's all.

CROSS EXAMINATION

"BY MR. COLE:

"Q. Dr. Spence, when you purchased or sought to purchase with your doctor friends these shares of stock from Balogh & Company, where did the funds for the purchase come from?"

* * * * * *

"THE WITNESS: From the First National Bank of Arlington.

"BY MR. COLE:

"Q. And did the First National Bank of Arlington provide the full total of $62,200.00?

"A. Yes; they provided it on security of notes signed by me and others, plus cash that was put up by myself and others.

"Q. About how much of the total of the $62,200.00 came from cash placed into the bank and how much of it was advanced as loans by the bank?

"A. I don't recall what the proportionment was.

"Q. Were you a -- did you put up any cash?

"A. Yes.

"Q. Do you remember how much that was?

"A. No; I don't.

"Q. Were you a signatory of any notes to the First National Bank with respect to any portion of that $62,200.00?

"A. Yes.

"Q. And were you a signatory to all of the notes?

"A. No; I think I signed two or three of them. I know of two and I believe three.

"Q. Did you recall how many you signed in August of 1959 and in what amounts?

"A. Well, that's the only time I signed any was that one time.

"Q. I thought you testified earlier that you made an arrangement with Dr. Bastien?

"A. Oh, that's correct. I stand corrected. Later on when Dr. Bastien asked to get out of it, I went back to

the bank and signed an additional note for his liability, what had been his liability."

Commencing on page 33, Spence made certain answers to the Court's questions as follows:

"How did you happen to decide later on in 1961 that Dr. Bastien had 400 shares or he got 400 shares?

"THE WITNESS: Well, actually there was no set agreement. I was responsible for the whole 6220 shares. I was buying and I was responsible for it, and I could have paid for it, but this hospital was a joint effort and it was my thought and what I wanted to do was that this stock would be distributed among a number of doctors and not just these four or five, but many others; for instance, Dr. Hugh Fulcher, who is a friend of mine and colleague, and he even went over to the First National Bank with the money to buy some of this stock, but Walter O'Donnell couldn't take it because the stock hadn't been issued, and there were other doctors. There is a Dr. Mitchell who has some money on deposit at the First National Bank for some of this stock and still does, so that there was no hard and fast agreement. I was buying these shares. I was morally obligated thereafter purchasing it to give certain amounts to some doctors, but no set amount. The money was put up -- actually the notes that I signed, I think if you will look at what was presented, comes to $30,000.00 worth of notes that I personally signed. I signed one note for nineteen hundred shares and another note for $4000.00, and then I signed a note which three signed for twenty thousand which would have been seven hundred shares apiece, so I actually have signed notes to the extent of three thousand shares, not nineteen hundred.

"THE COURT: But in Dr. Bastien's case when in 1961 you said he became disenchanted with the whole affair and wanted to get out ---

"THE WITNESS: Yes; he wanted to invest his money. Of course we all had cash up, but I just wanted to call the bank and find out how much cash I'd given Walter O'Donnell over three years ago. It was $4000.00 in cash, and he wanted to get his money out of it to invest in something else, and he called me and asked me if I would take over his liability at the bank, and I said I would, so at that time I signed a note, which

is part of the exhibit that Mr. Cole presented, for $4000.00 for four hundred shares."

4. In response to request No. 4, there is attached to the original of this statement only photostat copies of the notes signed by the various doctors under date of August 6, 1959, and which were defendant's exhibits Numbered 1 through 6 in the case of Spence v. Balogh & Company, Civil Action No. 1757-61.

4 (a) of the request asks for notes or other evidence of indebtedness given by the physicians to the bankrupt, and it is submitted, and all the records will show, that there was no evidence of any indebtedness ever given to the bankrupt, and the only thing given to it was a check for $62,200.00.

5. In response to request contained in request No. 5, there is submitted the following excerpts from the testimony of Walter J. O'Donnell, the President of the First National Bank of Arlington, and in answer to certain questions put to him by counsel for the bankrupt he gave the following testimony, commencing on page 173 of the transcript:

"Q. And was there a time when the actual advancing of funds by your bank become a fact?

"A. Yes.

"Q. And can you state the date on which that became a fact?

"A. August 6th.

"Q. And at that time did you request the doctors to execute any form of note?

"A. I did.

"Q. And can you state briefly and generally the nature of the transaction as it was established that

day with respect to the advance of these funds? I have in mind, did any of the doctors put in any cash? Did they borrow some money? The totals, if you can give them to us.

"A. The doctors put in some cash. Dr. Hazel advanced $1,000; Doctors Spence, Dolan, Schwartz and Bastien each put up $4,000 apiece -- or a total of $17,000. And among the doctors they signed notes for $45,200 -- or a total of $62,200, against which we drew a cashier's check payable to Balogh & Company.

"Q. I show you photocopies of notes which have been identified as Defendant's Exhibits 1, 2, 3, 4, 5 and 6 and ask you whether these are copies of notes executed by some of these doctors to your bank.

"A. This is a picture of a note, of the original which is in the bank, signed by Dr. Spence in the amount of $8,000.

"This is a joint note signed by Drs. Spence, Dolan and Schwartz, originally in the amount of $22,200, which I reduced to $20,000 upon receipt of a thousand dollars from Dr. Mitchell -- this was subsequent to August 6 -- and a note of Dr. Mitchell for $4,000 -- the basis of the reduction.

"A note of John Hazel, $7,000. We have the original at the bank.

"A note of Dr. Raymond Schwartz, $4,000.

"A note of Dr. William Dolan, $4,000.

"A note of Dr. William Spence, $4,000. However, as you can see, this is dated March 30th, 1961, and is an action subsequent to August 6th, 1959.

"Q. The first of these, that is, Defendant's Exhibits 1 through 5, were notes which were all executed on August 6th, 1959; is that correct?

"A. That is correct.

"Q. And the rest of these, Defendant's Exhibit 6, was executed on March 30, 1961?

"A. Yes."

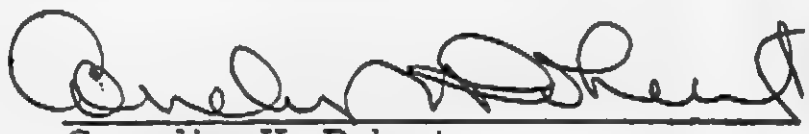
6. In response to request No. 6, it is stated that the notes signed by Spence were cancelled.

7. In response to request No. 7, there is no definite information in the record, or elsewhere, of any meeting at the Army and Navy Club on or about April of 1960, between Balogh and doctors, and there are definite statements that there was a meeting at Dr. Dolan's home on either April 9 or 10, 1960. The only reference to a meeting at the Army and Navy Club appears on page 438 of the transcript which was a meeting between Dr. Spence and counsel.

8. In response to request No. 8, in the memorandum attached to the answer of William T. Spence to the order to show cause, commencing at the bottom of page 1 of the memorandum, there is contained excerpts which counsel believes answers this request.

It is respectfully submitted that the foregoing covers all the information that counsel can find in answer to the requests of the trustee.

The information contained in this additional statement, taken with the excerpts previously filed herein, does include the material facts on each point as are disclosed by either depositions and/or the transcript of the testimony taken in the various causes and which is available to this Court.



Cornelius H. Doherty
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Washington, D. C.
Attorney for William T. Spence

[Certificate of Service Omitted in Printing]

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MEMORANDUM OF REFEREE IN BANKRUPTCY

This matter was initiated by the Trustee's Motion to Enjoin (1) Dr. William T. Spence ("Spence"), (a) plaintiff in Civil Action No. 2997-63 in this Court, and (b) plaintiff in Attachment Action No. 96-86 in the Circuit Court of Arlington County, Virginia; and to enjoin (2) First National Bank of Arlington ("Bank") and (3) for an order to show cause why the escrow deposit in said bank should not be turned over to the Trustee in Bankruptcy.

Thereafter an ex parte order was entered restraining Spence from pursuing further action in Civil Action No. 2997-63 in this Court and/or in the Attachment Action No. 96-86 in the Circuit Court of Arlington County; restraining the Bank from further proceedings in connection with the aforesaid Attachment Action and from setting off against any asset of the bankrupt to the Bank; and requiring Spence, the Bank and Stephen E. Balogh ("Balogh") show cause why the said restraining orders should not be made permanent; why the several claims therein described should not be made and asserted for summary adjudication by this Court; and why the bankrupt's deposit in the Bank should not be turned over to the Trustee in Bankruptcy.

Answers were filed by Spence and the Bank within the time required by the Order, but Balogh did not respond in writing as required.

Following the hearing required by the above Order, a further Order was entered on October 27, 1964 (1) decreeing that this Court had summary jurisdiction over all of the issues raised in the two actions above described and all claims to the $12,200 on deposit in the Bank in the name "Balogh & Company Escrow Account"; (2) withholding entry of a permanent injunction upon

assurance of counsel for Spence and the Bank that no further action would be taken in connection with the described pending suits without prior authorization by this Court; (3) taking under advisement the prayer requesting turnover of the $12,200 deposit in the Bank to the Trustee in Bankruptcy; (4) fixing the time for the submission of a stipulated statement of facts or, in the alternative setting a hearing for taking testimony of all issues; and (5) denying the request of Balogh for further time to file a response to the Trustee's Motion.

Subsequently, an "agreed statement of facts" was filed, but because of its form and contents it could be called, more properly, an "agreed statement of selected parts of the testimony of witnesses in other proceedings related to the same transaction from which this controversy has developed." Thereafter, in compliance with an Order of this Court, entered upon application of the Trustee in Bankruptcy, counsel for Spence filed an additional statement of facts which included similar selected parts of the testimony in other proceedings and certain documentary evidence. This was followed by hearings at which testimony was taken. Memoranda were filed by the Trustee in Bankruptcy, Spence and the Bank.

THE ISSUES

The principal issue in this proceeding is: Who is entitled to receive all, or a part, of the $12,200 on deposit in the Bank in the name of Balogh & Company Escrow Account.

There are other issues, of course, but disposition of the major issue will, to a large extent, dispose of them or reduce their importance to a minimum. Therefore, attention will be directed to the principal issue and the sub-issues will be treated as they arise.

THE FACTS

Because of the manner in which the evidence was presented it was extremely difficult to isolate and identify the facts essential to the determination of the issues, particularly in connection with their chronological relationship, one to the other.

The matter could not have been made more confusing had it been deliberately planned to achieve that result, which this Court is quite sure was not the intention of counsel.

To achieve some degree of orderliness, we shall first set forth the basic facts in the closest approach to the chronology of events possible. As additional facts, related to specific areas of the problem, become important to a resolution of the issues they will be introduced in the specific areas under discussion.

CHRONOLOGICAL GENERAL FINDINGS OF FACT

August 3, 1959. On this date Balogh & Company, Inc. ("Company") was engaged in offering shares of Northern Virginia Doctors Hospital ("Hospital") stock for sale to the public under a valid underwriting agreement and on this date was in a position to offer 6,220 shares of said stock for sale.

August 3, 1959. On this date, in the early afternoon, Spence, Dr. John T. Hazel ("Hazel"), Dr. William D. Dolan ("Dolan") and Dr. Raymond Schwartz ("Schwartz") visited Balogh's office and discussed with him their possible purchase of 6,220 shares of Hospital stock; but there had been some discussion of the matter between Spence and Balogh prior to that time.

August 3, 1959. On this date, Spence telephoned Balogh at his home after office hours and placed an order for 6,220 shares of Hospital Stock for himself and other undisclosed persons, with instructions to confirm the sale to Walter J. O'Donnell ("O'Donnell") as Agent. O'Donnell was president of the Bank.

August 4, 1959. On this date as directed by Spence, Company confirms sale of 6,220 shares of Hospital stock to O'Donnell, Agent, without any disclosure of names of principals.

August 4, 1959. On this date, prior to opening for business, Company received a telegram notice from Hospital cancelling its underwriting agreement.

August 6, 1959. On this date Spence, Hazel, Dolan, Schwarz and Dr. Henry L. Bastien ("Bastien") by deposits of cash and execution of collateral notes secured by the shares of Hospital stock they are to receive as follows:

	Cash Advanced	Amount of Notes **	Total	Shares Securing Notes
Spence	$ 4,000	$ 8,000	$12,000	1,900
Hazel	1,000	7,000	8,000	800
Dolan	4,000	4,000	8,000	1,620
Schwartz	4,000	4,000	8,000	1,500
Bastien	4,000	--	4,000	-- ***
Spence, Dolan, and Schwartz	--	22,200	22,200	--
Totals	$17,000	$45,200	$62,200	5,820

caused the Bank to issue its cashier's check in the amount of $62,200 for the purchase 6,220 shares of Hospital Stock.

---

* Drs. Hazel, Dolan, Schwartz and Bastien.

** Notes dated August 6, 1959 drawn to order of Bank.

*** Dr. Bastien paid cash and did not pledge his 400 shares.

August 6, 1959. On this date O'Donnell, accompanied by Spence and some, if not all, of the other Doctors*, came to the office of the Company and delivered the $62,200 cashier's check in payment of the stock and a letter dated August 6, 1959, from O'Donnell to the Company instructing the Company to have the stock issued to the Doctors* and Spence in the amounts set forth above, and advising the Company that the stock had been pledged to the Bank as collateral security for the loans.

August 6, 1959. On this date, shortly after the delivery of the check and letter described above, Balogh, accompanied by O'Donnell, Spence and some, if not all of the Doctors*, ignoring the notice of cancellation of the underwriting agreement received on August 4, 1959, went to the office of the Transfer Agent and delivered by hand the cashier's check check for $62,200 and a letter dated August 6, 1959 from the Company to the Transfer Agent directing payment of a $9,330 commission to the Company and issuance of the shares of stock as follows: Hazel, 800 shares; Schwartz, 1,500 shares; Spence, 1,900 shares; Bastien, 400 shares; Dolan, 1,620 shares.

The stock was not issued by the Transfer Agent as directed because the Hospital had withdrawn the certificates from it.

September 18, 1959. On this date, Hazel, Schwartz, Spence and Dolan, alleging that they and Bastien were the purchasers of 6,220 shares of stock, as above set forth, filed a suit in the Circuit Court of Arlington County, Virginia, Chancery No. 10899, against the Hospital, its President and Secretary, to compel the Hospital to issue the stock purchased by the plaintiffs.

Subsequent to August 6, 1959. The note of Spence, Dolan and Schwartz to the Bank for $22,200, was reduced to $20,000 upon receipt of $1,000, cash,

and a note for $4,000 received from a --- Mitchell. This changed the cash contributions and notes held by the Bank for the purchase of the stock as follows:

	Cash Advanced	Amount of Notes	Totals
Spence	$4,000	$ 8,000	$12,000
Hazel	1,000	7,000	8,000
Dolan	4,000	4,000	8,000
Schwartz	4,000	4,000	8,000
Bastien	4,000	--	4,000
Dr. Mitchell	1,000	4,000	5,000
Spence, Dolan, and Schwartz	--	20,000	20,000
Totals	$18,000	$47,000	$65,000

but there is no testimony indicating that there was a change in the allotment of shares of stock among the parties.

September 22, 1959. On this date, by agreement between O'Donnell and Balogh, the Company opened an account with the Bank, under the name Balogh & Company, Inc., Escrow Account, and deposited therein the $62,200 pending the outcome of the litigation between Spence and the other Doctors and the Hospital over the issuance of the stock, subject to withdrawal only for the purchase of the stock and payment of commissions to the Company by check issued by the Company payable only upon the specific approval of O'Donnell "acting as de facto trustee for the doctors who had advanced the funds."

October 2, 1959. On this date the Company borrowed $9,000 from the Bank on its unsecured promissory note to replace a like amount that it had withdrawn from the Escrow Account as a part of its earned commission. The Bank had knowledge of the purpose of this loan.

December 28, 1960. On this date, and with the Bank's consent, Balogh substituted his note in the amount of $9,000 for the Company's note in a like amount to the Bank at the direction of the Company's C.P.A. and with the Bank's knowledge of the purpose.

January 16, 1961. On this date, the Supreme Court of Appeals of Virginia, on an appeal by Spence, only, affirmed the Judgment of the Circuit Court of Arlington County, Virginia, which denied relief to Hazel, Schwartz, Spence and Dolan in their action against the Hospital (commenced on September 18, 1959) to compel the issuance of the stock purchased by the four plaintiffs through the Company. Among other things, the appellate court ruled that Spence, having claimed 1,900 shares in the Circuit Court action could not, on an appeal, attempt to recover all of the shares ordered. Spence vs. Northern Virginia Doctors Hospital Corporation, 202 Va. 478, 117 S.E. 2d 657 (1961).

Between September 18, 1959, when Hazel, Schwartz, Spence and Dolan initiated their action in the Circuit Court of Arlington County, Virginia against the Hospital to compel it to issue the 6,220 shares of stock, as per the instructions to the Transfer Agent, and January 16, 1961, when the Supreme Court of Appeals of Virginia, on an appeal by Spence, alone, from the adverse decision of the Circuit Court of Arlington County, Virginia, affirmed the judgment of the lower Court, discussions were had by Spence and others with representatives of the Hospital with respect to obtaining the 6,220 shares of stock.

What transpired during that period is best stated in the Memorandum Opinion of Judge William B. Jones in Spence v. Balogh & Company, Inc., Civil Action No. 1757-61, 216 F Supp. 492 (1962), where it is stated:

> "While the Virginia litigation was pending, discussions were had by plaintiff and others with representatives of the Hospital with respect to obtaining 6220 shares of stock. In April, 1960, counsel for the Hospital advised counsel for plaintiff that the Hospital would issue 5850 shares of its stock to plaintiff. This letter resulted in a meeting attended by plaintiff, his counsel, president of defendant,

and two or three of the other physicians. While the evidence is conflicting as to the reasons for not accepting the Hospital's offer of 5850 shares, plaintiff testified that he did not direct defendant to take up that number of shares. And plaintiff independent of defendant did not accept the 5850 shares. Rather counsel for plaintiff replied to counsel for Hospital suggesting a meeting of counsel, plaintiff and officers of the Hospital for the purpose of working out an amicable settlement. At that time defendant's president understood that defendant would be advised by plaintiff's counsel as to what action should be taken concerning the acquisition of the shares of stock.

"Thereafter Riggs National Bank advised defendant that as of the close of business on April 18, 1960, it would have available 6220 shares of Hospital stock for issuance in accordance with the letter of instructions given to the Riggs National Bank in August, 1959. Upon receipt of that letter, an attorney for defendant inquired of the Bank and also of the president of the Hospital as to the transfer agent's authority to issue the 6220 shares of stock to the plaintiff and the other physicians. Copies of those letters requesting such information were sent to counsel for the plaintiff The information sought by the attorney for the defendant was never furnished by either the Bank or the Hospital. However, plaintiff was notified by the Hospital that at the close of business on April 25, 1960, the transfer books of the corporation would be closed and that unless plaintiff paid for and took up the 6220 shares of stock by that time the offer to make the shares available would be withdrawn. While both plaintiff and his counsel saw the notice from the Hospital on April 25 prior to the close of business, defendant was never made aware of that information by plaintiff, his counsel, or anyone else until some date subsequent to April 25. Plaintiff did not pay the purchase price within the time provided and he has not received the shares of stock."

March 7, 1961. On this date the Company sued the Hospital for damages, including a $9,330 commission for the sale of the 6220 shares of stock on August 4, 1959, in the United States District Court for the Eastern District of Virginia, being Civil Action No. 2334.

March 30, 1961. On this date, Spence gave his unsecured note for $4,000 to the Bank for the purpose of permitting the Bank to pay $4,000 to Bastien, who desired to withdraw from the purchasing group. This then changed the contributions to and notes held by the Bank as follows:

	Cash Advanced	Amount of Notes	Totals	Shares Securing Notes
Spence	$ 4,000	$ 8,000	$12,000	1,900
Spence	--	4,000	4,000	-- *
Hazel	1,000	7,000	8,000	800
Dolan	4,000	4,000	8,000	1,620
Schwartz	4,000	4,000	8,000	1,500
Spence, Dolan and Schwartz	--	20,000	20,000	--
Dr. Mitchell	1,000	4,000	5,000	--
Totals	$14,000	$51,000	$65,000	5,820

June 5, 1961. On this date, Spence filed suit against the Company in the United States District Court for the District of Columbia, Civil Action No. 1757-61, to require the Company to deliver 6,220 shares of Hospital Stock and to pay $15,000 for reimbursement of monies expended and attorneys' fees or, alternatively, to recover money damages totaling $201,600. The Company answered but did not file a counterclaim for commissions and/or damages.

July 26, 1962. On this date, District Judge William B. Jones filed his memorandum in Spence vs. Balogh & Company, Inc., Civil Action No. 1757-61 in which he found for the defendant Company; (but did not consider the Company's contentions that Spence was not the real party in interest and that the Arlington, Virginia litigation was conclusive of the rights asserted here by plaintiff). Judgment was entered July 31, 1962.

April 25, 1963. On this date, the United States Court of Appeals, District of Columbia Circuit, affirmed the judgment of the District Court in Spence v. Balogh & Company, Inc., Civil Action No. 1757-61 for the reasons

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* The note given by Spence to Bank on March 30, 1961 did not schedule 400 shares formerly assigned to Bastien as Security for the note.)

given in the opinion of District Judge Jones dismissing the action on its merits after trial. A petition for rehearing was denied on May 28, 1963, Spence v. Balogh & Company, Inc., 115 U.S. App. D.C. 209 (1963), 317 Fed. 909; Cert. Den. October 14, 1963, Spence v. Balogh & Company, Inc., 375 U.S. 823, 11 Led 2d 58, 84 S. Ct. 67.

October 28, 1963. On this date, the Company released $50,000 from the Escrow Account in the Bank to the Bank. Thereafter, the Bank returned all of the notes received by it from, Spence, Dolan, Hazel and Schwartz on August 6, 1959, and from Spence on March 30, 1961, to the makers. There is no indication as to what happened to the Dr. Mitchell note.

December 16, 1963. On this date, a suit was filed by Spence against the Company in the United States District Court for the District of Columbia, Civil Action No. 2997-63, seeking recovery of the $12,200 remaining in the Balogh & Company, Inc. Escrow Account in the Bank. Spence alleges that he purchased the 6,220 shares of Hospital Stock from the Company; that he delivered the sum of $62,200 to the Company; that the Company was unable to deliver the stock and the $62,200 was placed in the Escrow Account pending the final disposition of litigation covering the stock; that the litigation was terminated on October 14, 1963; that thereafter the Company released $50,000 of the amount in escrow; and that the Company has failed and refused to release the balance of $12,200. On January 8, 1964 an answer was filed by the Company, including a counter-claim for $9,330 for the loss of its underwriting commission, $25,000 for reimbursement of attorney's fees, costs, etc., and $250,000 damages for loss and injury to its name, good will, etc. it is to be noted that the counter-claim is directed to Spence alone, and is not directed to the $12,200 on deposit in the Escrow Account.

This action is a part of the proceedings now before this Court.

Prior to March, 1964. The Company settled its suit against the Hospital for damages filed March 7, 1961 in the United States District Court for the Eastern District of Virginia, being Civil Action No. 2334, for an undisclosed "nominal" amount.

In March, 1964. The Company issued a check drawn on the Escrow Account to the Bank for $9,338 to pay off the $9,000 note signed by Balogh as a substitute for the $9,000 note previously signed by the Company, and interest.

Six or seven days after the Company issued the $9,338 check on the Escrow Account to the Bank, the Bank advised the Company it could not be used because of a new Spence action against the Company.

March 30, 1964. On this date a notice of Motion for Judgment was filed in Attachment Action No. 96-86 in the Circuit Court for Arlington County, Virginia, and thereafter the funds in the Bank in the name of "Balogh & Company Escrow Account" in the sum of $12,200 were attached. This suit was filed by Spence against the Company, Balogh and the Bank.

This action is a part of the proceedings now before this Court.

April 22, 1964. On this date, Dolan, Schwartz and Hazel gave a letter to the Bank consenting to the Bank filing an answer in the matter pending in the Circuit Court of Arlington County, (Attachment Action No. 96-86), stating that the funds in the Escrow Account belonged to Spence.

August 19, 1964. On this date the Company filed its voluntary bankruptcy petition.

November 20, 1964. On this date O'Donnell advises Spence's attorney as to the present status of the Balogh & Co., Inc., Escrow Account, as follows:

"Pursuant to your request for information relative to the Balogh and Co., Inc. Escrow Account, established with this bank in the amount of $62,200 on September 22, 1959, you are advised that these funds had been presented to Balogh and Company for the purchase of 6220 shares of stock in the Northern Virginia Doctors Hospital.

"For reasons known to you, Balogh and Company was unable to deliver the stock; therefore, the account was set up, pending the outcome of the litigation involved in the ostensible Doctors Hospital stock purchase and sale. The funds were not subject to withdrawal except upon the specific approval of the undersigned, acting as de facto trustee for the doctors who had advanced the funds.

"On October 28, 1963, Balogh and Company authorized the release of $50,000 of the account to the doctors involved. There is today a balance of $12,200, which is still held in trust for the doctors, and our Bookkeeping Department is still under strict orders not to pay against this account without specific authority from the undersigned.

"If you desire any further information, please communicate with me."

Additional facts pertaining to specific areas of the various matters under consideration will be set forth as required.

THE BASIC LAW

Date for Establishing Rights of Parties

It is a fundamental principle of bankruptcy law that if a date for establishing the rights of parties be not specifically fixed otherwise by the Bankruptcy Act then it shall be the date on which the petition initiating the bankruptcy proceeding was filed. (4 Collier p. 965)

The claim of an alleged beneficiary to property held in trust, or the right to share in such property, is to be determined as of the date of

bankruptcy. Re Crescent Athletic Club of Brooklyn, Inc. (E.D. N.Y. 1940) 33 F Supp. 132; 46 Am. B.R. (N.S.) 513.

Mutuality of debts and credits between bankrupt and party claiming right of set off must have existed when petition in bankruptcy was filed. Avant v. U.S. (D.C. Va.) 165 Fed. Supp. 802.

Money Held in Escrow

Money held in escrow is not property which vests in a trustee in bankruptcy, though the money was paid to and held by one of the parties to the escrow who subsequently became the bankrupt, but the bankrupt in such cases, and subsequently his trustee, is regarded as holding so-called escrow funds in trust under terms of an agreement and not for general creditors. Gulf Petroleum, S.A. vs. Collazo (C.A. Puerto Rico 1963) 316 F. 2d 257.

Money held in escrow by the bankrupt may constitute a trust fund for those entitled to it. Stickney vs. General Electric Co. (CCA 4th 19) 16 Am. B.R. (N.S.) 504, 44 F2d 362; Matter of Fike, (Ref. N.D. Ohio 1955) 29 J. of Nat'l Assn. of Ref. 136.

Property Held by Bankrupt as Trustee

Where the bankrupt was in possession of property impressed with a trust which is valid under the terms of the Act, the bankruptcy trustee generally holds such property subject to the outstanding interest of the beneficiaries. When it appears that the bankrupt was only a trustee and had no beneficial interest in or claim against the property, even though he held the legal title thereto which passed to the bankruptcy trustee, the court should turn the property over to the true owners where possible. The burden rests upon the claimant to establish the original trust relationship and he

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must prove his title and identify the trust fund or property. Where the bankrupt is acting as trustee of an express trust, such title passes to his trustee in bankruptcy subject to the claims of the beneficiaries thereof where such property can be properly identified. The fact that the bankrupt kept particular moneys in a separate account or fund may be evidentiary of an intention to assume the obligation of a trustee, but standing alone it does not establish a trust relation. The burden is on the claimant to establish the existence of the trust before a claim to the property or proceeds in the hands of a bankruptcy trustee can be made on that ground. (4 Collier pp 1202-1212)

Generally speaking, the trustee takes the bankrupt's property subject to all valid claims, liens and equities, and it is well settled that property of a third person in the possession of a bankrupt, <u>where proper proofs of title are shown by the claimant</u>, should not be included in the assets of the Bankrupt's estate. (4 Collier pp 1284-1285)

Persons seeking to recover trust funds which they claim to have traced into the possession of the trustee's trustee in bankruptcy are under the burden of proving their title and if the evidence leaves the identification in doubt, that doubt must be resolved in favor of the trustee in bankruptcy. Schuyler vs. Littlefield (1914), 58 L. Ed. 806; American Service Co. vs. Henderson (1941) 135 A.L.R. 1414.

<u>Ultimate Distribution of Trust Fund</u>

Where funds were held in a trust Company account "in escrow, in trust pending settlement of financial conditions of the lodge" in the name of Secretary and Chairman of the board of trustees "subject to disposition by the lodge, and any court that may pass upon it", it was held that the Receiver in Bankruptcy was entitled to the funds, subject to reclamation

proceedings on part of any member who may apply. In re Benevolent & Protective Order of Elks, Brooklyn Lodge No. 22. (D.C. E.D. N.Y. - 1933) 3 F. Supp. 560.

Assignment of Rights

It is important to determine whether or not a purported assignment actually transfers a legal title. If it does not, the alleged transferee is a mere agent to bring suit rather than an assignee for collection, and as such is not a real party in interest. (Archie v Shell Oil (ED La 1953) 110 F. Supp. 542, off'd (CA 5th 1954) 210 F2d 653, Cert. denied (1954) 99 Led 665.

CLAIM OF WILLIAM T. SPENCE

Spence presents three questions, the answers to which he suggests will resolve the issues now under consideration.

Question No. 1

"Is the escrow fund in the name of Balogh & Company, which was deposited on September 22, 1959, in the First National Bank of Arlington, for the specific purpose of purchasing 6220 shares of the stock of the Hospital Corporation, which remained in its identical form from that date to the present, an identifiable security reclaimable by Spence in accordance with Title 11, Section 96(e)(4)?"

Title 11, Section 96(e)(4) of the United States Code, is Section 60e(4) of the Bankruptcy Act and provides as follows:

"(4) No cash received by a stockbroker from or for the account of a customer for

> the purchase or sale of securities, and no securities or similar property received by a stockbroker from or for the account of a cash customer for sale and remittance or pursuant to purchase or as collateral security, or for safekeeping, or any substitutes therefor or the proceeds thereof, shall for the purposes of this subdivision e be deemed to be specifically identified, unless such property remained in its identical form in the stockbroker's possession until the date of bankruptcy, or unless such property or any substitutes therefor or the proceeds thereof were, more than four months before bankruptcy or at a time while the stockbroker was solvent, allocated to or physically set aside for such customer, and remained so allocated or set aside at the date of bankruptcy." (Emphasis supplied.)

The argument advanced by Spence at page 6 of the Memorandum filed by him on February 8, 1965, indicates a misunderstanding of the results obtainable under Section 96(e).

Though stated negatively, paragraph (4) of Section 96(e) would seem to permit a person who delivered cash to a broker against a future purchase to reclaim his money if he can meet the requirements of that paragraph, yet such person, not being entitled to immediate possession of securities and therefore not a "cash customer" as defined in paragraph (1) of Section 96(e), is denied the right to trace his property by paragraph (2) of Section 96(e) which impliedly gives that right only to a "cash customer". By paragraph (2) the property of such customer constitutes part of the single and separate fund; by paragraph (4) it belongs entirely to the customer if he can identify it. For a full discussion of this problem see 3 Collier on Bankruptcy, 14th Edition, beginning at page 1174.

All customers who have claims against a bankrupt stockbroker for money, whether it represents the customers' deposits or the proceeds or sales

of customers' securities, would seem to be forced into the single and separate class under Section 96(e)(2). 3 Collier, page 1190. This would then mean that the money which Spence seeks to obtain would have to be allocated to the single and separate fund, where it would be distributed among all creditors having a proper claim to said fund.

However, and apart from Section 96(e), if a broker opens an account, and makes deposits therein, for the benefit of customers who have free credit balances, he might thereby create a trust for them if he intends that result. 3 Collier, page 1192. A fund as created by Balogh and O'Donnell is something quite different from the fund recognized in Section 96(e) in that it is not a fund created by law - it is one created by agreement of the parties.

There is no question but that the Company intended to create a trust in the nature of an escrow account when it opened the Balogh & Company, Inc., Escrow Account in the Bank on September 22, 1959 under its agreement with O'Donnell.

Question No. 2

"Is Spence a real party in interest and entitled to the $12,200 held in the Escrow Account in the First National Bank of Arlington?"

The arguments advanced by Spence in support of his claim to being the real party in interest, as set forth on pages 7, 8, and 9 of his Memorandum filed on February 8, 1965 are:

1. Spence had the original contract for the purchase of 6220 shares of stock and that after the purchase of the stock by Spence he agreed with various doctors to assign them a certain number of these shares. That this sale or assignment was not final for there were other doctors who were interested.

2. That the trustee in this case is in no position as a party to say that Spence is not the real party in interest, especially when the record discloses that any interest which any other party may have has been released to Spence.

There is no question that Spence made the telephone call to Balogh for the purchase of the 6220 shares of stock. But the evidence does not support the conclusion that Spence purchased the stock. The evidence clearly establishes the fact that (1) Spence placed the order for the stock on behalf of himself and undisclosed doctors; (2) that the confirmation of the sale was to be made to O'Donnell as Agent for the purchasers; (3) that four other doctors besides Spence were represented by O'Donnell in the purchase of the stock; and (4) that these four doctors and Spence jointly and severally arranged for the financing to provide the funds to purchase the stock.

Furthermore, it has been well established by the evidence submitted in this proceeding that the Balogh & Company, Inc., Escrow Account, was created by agreement between the Company and O'Donnell as agent, to protect the interests of the several doctors supplying the money, through the medium of cash advanced from their own funds or money borrowed from the Bank, toward the purchase of the stock. There is no evidence that Spence participated in this agreement or had anything to do with it. As so clearly stated by O'Donnell in his letter of November 20, 1964, the escrow account was set up to protect the interests of the doctors who had advanced the funds, and the $12,200 balance remaining in the account is held in trust for the doctors.

This is not an action relating to the 6220 shares of stock, it is an action to determine who is entitled to receive the $12,200 now on deposit in the Escrow Account.

The record in this proceeding does not disclose that the interests of other parties in the Escrow Account have been released to Spence. Spence relies on a copy of a statement signed by Dolan, Schwartz and Hazel on April 22, 1964, directed to the Bank, reading as follows:

> "We the undersigned, in agreement with Dr. William T. Spence, are the owners of the escrow funds held in your bank by virtue of your agreement with Balogh & Co.
>
> "We, and each of us, hereby release any and all right that we may have to that fund insofar as it refers to your Bank, and consent to the filing of an answer in the case of William T. Spence vs. Balogh & Co., No. 9686, pending in the Circuit Court of Arlington County, Virginia, stating that the funds so held belong to William T. Spence."

This is not an agreement under which Dolan, Schwartz and Hazel release and assign to Spence whatever rights and interest they have in the Escrow Account.

This document says one thing, and one thing only: We, Dolan, Schwartz and Hazel together with Spence, are the owners of the Escrow Account; we release any and all right that we may have to that fund insofar as it refers to your Bank; and we consent that you file a <u>false</u> answer in the case of Spence v Balogh stating that the funds so held belong to Spence.

It is not an assignment of the rights of Dolan, Schwartz and Hazel in the Escrow Account to Spence. The language used is very clear that Dolan, Schwartz and Hazel release their rights to the Escrow Account only so far as it refers to the Bank.

If no interest is transferred by an alleged assignment, the alleged transferee is not a real party in interest and cannot maintain the action.

Archie v. Shell Oil (E.D. La. 1953) 110 F. Supp. 542, Aff'd (C.A. 5th 1954) 210 F2d 653, Cert. den. (1954) 99 L Ed 665.

Insofar as the Escrow Account is concerned, Spence is not the real party in interest, he did not create the fund, he did not create the escrow account, he has not acquired the rights of Dolan, Schwartz and Hazel by purchase and assignment and he is only one of several claimants to the fund.

The precedents cited by Spence are based on facts which have no resemblance to the facts in the matter now under consideration.

Question No. 3

"Does Balogh have any claim to the fund for its alleged claim for commission on the sale of the stock to Spence?"

In answering this question, Spence asserts that if the Company had any action or claim against Spence growing out of the purchase of the Hospital Stock, that cause of action grew out of the sale of stock to Spence and would be a compulsory counter-claim under Rule 13(a), 28 U.S.C.A., which the Company would have been required to assert in the action Spence brought against the Company in Civil Action No. 1757-61 in the United States District Court for the District of Columbia, wherein Spence claimed he had sustained damages by reason of the failure of Balogh to deliver the 6220 shares of Hospital Stock in accordance with his original contract and also for his failure to use the $62,200 in the Escrow Account for the purchase of the stock when it was made available by the Hospital on April 18, 1960. He argues that Civil Action No. 1757-61 was not filed until June 5, 1961, more than a year after the failure of Balogh to take up the stock when it was made available, and there is nothing in the record of that cause, by pleading or evidence, that the $62,200 in the Escrow Account for the purchase of the stock, was an issue in that proceeding.

This question will be considered in connection with the claim of the Trustee against the Escrow Account for damages.

CLAIM OF TRUSTEE IN BANKRUPTCY

The Trustee asserts that he is entitled to the $12,200 in the Escrow Account as against Spence for the following reasons:

Reason No. 1

> "(1) Dr. William T. Spence has no further claim thereto, having been fully reimbursed and satisfied for any money advanced by him for the purchase of the shares allocable to him of the Hospital. The claims of Drs. Hazel, Schwartz and Dolan to this fund no longer exist in that they and each of them have been fully reimbursed and paid any expenditure for their investment in regard to purchase of the Hospital stock and have made no claim to the said fund or brought any action with respect thereto, and their rights respecting the claim to the said stock have been fully adjudicated and are res adjudicata as a result of the opinion of the Supreme Court of Appeals, Commonwealth of Virginia, constituting part of the record in this proceeding."

There is no evidence in this proceeding to support the assertion that Spence has no claim to the $12,200 because he has been fully reimbursed for any money advanced by him for the purchase of the shares allocable to him.

The evidence shows that Spence, Hazel, Dolan, Schwartz, Bastien and Mitchell, each contributed a specific amount of cash toward the purchase price of the stock in the aggregate amount of $18,000, and that each of them, with the exception of Bastien, delivered their promissory notes to the Bank in the aggregate amount of $51,000, including Spence's March 30, 1961 note for $4,000, leaving the status of the fund on March 30, 1961 as set forth on page 10. The evidence further shows that the Bank waived any interest charges

on the notes, and that on October 28, 1963, the Company released $50,000 from the Escrow Account to the Bank, which the Bank used to pay the notes of Spence, Hazel, Dolan and Schwartz in the total amount of $47,000. (There is no evidence as to what happened to Dr. Mitchell's cash deposit of $1,000 or his note for $4,000) There is no evidence that any repayments were made to any of the parties, including Spence, for their cash contributions to the $62,200 fund.

The evidence does show that the rights of Spence, Hazel, Dolan and Schwartz to the shares of stock allotted to each as against the Hospital have been fully adjudicated and are res adjudicata, and the record in this bankruptcy proceeding does show that Hazel, Dolan and Schwartz (and Mitchell) have made no claim to the fund or brought any action with respect thereto. However, the determination of the rights of the several parties to obtain the stock from the Hospital is not a determination of the rights of the parties to the $12,200 remaining in the Escrow Account, nor is the fact that some of them have not made claims to the fund determinative of their right to make such claims, and the right of the Trustee to resist them.

Specifically, as to Spence, he has made a claim to the whole fund by means of Civil Action No. 2997-63 in this Court, and Attachment Action No. 96-86 in the Circuit Court of Arlington County, Virginia, which he has failed to establish, but in the course of which it was made to appear that he did contribute $4,000 cash to the original $62,200 fund. With $3,000 of the $50,000 released to the Bank unaccounted for, and Spence's reluctance to admit that he did contribute $4,000 cash to the fund and his insistance that he is entitled to the whole $12,200, this Court is without sufficient information to make a determination of his right to any part of the $12,200 remaining.

Reason No. 2

> "(2) Dr. William T. Spence has, in numerous causes of action, in both the District of Columbia and Virginia, asserted a claim against Balogh & Company, Inc., for damages resulting from the effort to purchase these shares of stock, all of which have resulted in adverse decisions to Dr. Spence and in favor of Balogh & Company, Inc., in the trial court and in the appellate courts where appeals were taken."

This statement is not supported by the evidence. Spence filed one action on June 5, 1961 in the United States District Court for the District of Columbia against the Company, being Civil Action 1757-61, to require the Company to deliver the 6220 shares of Hospital Stock to and reimburse him for $15,000 expenses, or, alternatively, to recover money damages in the amount of $201,600. Spence was unsuccessful in the District Court, in the Circuit Court of Appeals and in the Supreme Court. On December 16, 1963, Spence filed a suit against the Company in the United States District Court for the District of Columbia, Civil Action No. 2997-63, seeking recovery of the $12,200 in the Escrow Account; and in March, 1964 Spence filed Attachment Action No. 96-86 in the Circuit Court of Arlington County, Virginia, for the same purpose.

These were the only three actions by Spence against the Company and only the first one resulted in an adverse decision to Dr. Spence, and it was the only one in which an appeal was taken. The last two actions are the matters now under consideration by this Court, and will be disposed of by this memorandum.

Reason No. 3

> "(3) Dr. William T. Spence's action in Civil Action No. 2997-63, seeking this

> fund, is a splinter cause of action necessarily part of the prior cause of action in this court, Civil Action No. 1757-61, which had been adjudicated adversely to Dr. Spence, and in which cause of action Dr. Spence made claim to the entire $62,200.00 fund in the said account at the Bank."

This statement is not supported by the evidence. Civil Action No. 1757-61, which has been adjudicated, did not involve a claim by Spence to the $62,200 fund. As stated above, by that action Spence attempted to require the Company to deliver the 6220 shares of stock and reimburse him for $15,000 expenses, or alternatively, to recover money damages of $201,600.

Civil Action No. 2997-63 was Spence's first attempt to recover any part of the Escrow Account.

The decision of Judge Jones in Civil Action No. 1757-61 did not in any manner, shape or form, adjudicate the rights of Spence, the Trustee, or any other party to the $62,200 then on deposit in the Escrow Account.

Reason No. 4

> "(4) The ruling of Judge William B. Jones in his Memorandum Opinion, affirmed on appeal and certiorari denied, United States Supreme Court, is res adjudicata as to Dr. William T. Spence's further entitlement to, or claim against said fund."

For reasons above stated, this statement (4) has no basis in fact. There has never been an adjudication as to Spence's right to the whole, or any part, of the Escrow Account.

Reason No. 5

> "(5) Dr. William T. Spence is liable to the bankrupt corporation for the commission which

would have been payable to the bankrupt corporation but for his failure to purchase the said stock available to him in April 1960 to the extent of $9,330.00."

The Trustee concedes that a claim for commissions themselves no longer lies by virtue of the compromise settlement of the action brought by the Company against the Hospital in the Circuit Court for Arlington County. The Trustee, however, does assert that Spence is liable in damages for the loss of said commissions arising out of his failure and refusal to consumate the purchase of the stock at a time when that was possible and solely within his power in April, 1960 as found by Judge Jones in his Memorandum of July 31, 1962.

Any claim which the Company had against Spence for his failure to consumate the purchase of the stock at a time when this was possible in April, 1960, should have been advanced as a counter-claim in its reply to the action brought by Spence against it in Civil Action 1757-61 under the requirements of Rule 13(a) of the Rules of Civil Procedure.

Furthermore, the $12,200 remaining in the Escrow Account is not the exclusive property of Spence and he has not established a right to the entire amount. Whatever damages the Trustee seeks because of the failure of Spence to complete the sale when able cannot be charged against the other Doctors contributing to the fund until their rights to the fund and their liability to the Company has been established.

QUALIFICATIONS

In making the above findings, this Court is not deciding whether or not any of the Doctors contributing to the fund are entitled to recover, individually or collectively, all or any part of the remaining $12,200; or

whether the Trustee has any defenses, technical or factual to any claims which may be presented.

CLAIM OF FIRST NATIONAL BANK OF ARLINGTON

On October 2, 1959, the Company borrowed $9,000 from the Bank on its corporate note against commissions that it, Balogh and Company, believed it would be entitled to when the then pending litigation was settled and the sale of the stock concluded. It is clear that the Bank also was acting under the same belief. Following the granting of this loan, Balogh, in December, 1960, on the advice of his Company's Certified Public Accountant, advised the Bank of the problem faced by his Company if the loan to the Bank was continued in the Company's name and requested the Bank to exchange the aforesaid $9,000 Company note for his individual note in the same amount.

The Bank granted Balogh's request, and on December 28, 1960 Balogh gave the Bank his personal note for $9,000 and the Bank returned the $9,000 Company note to Balogh and Company as fully paid. There does not appear to be any doubt that the $9,000 personal note signed by Balogh was given to and received by the Bank in exchange and substitution for the $9,000 Balogh and Company note, and that Balogh received no other consideration for his personal note.

In March of 1964 the Bank made a demand upon Balogh for payment of the $9,000 personal note, following which he tendered the Bank a check drawn on the Balogh and Company Escrow Account in the amount of $9,338 to pay off the note, but payment thereon was stopped by reason of the attachment action started by Spence.

This check was drawn on the Escrow Account by Balogh, as president of Balogh and Company, on the basis of his belief that Balogh and Company was en-

titled to be paid its commission on the sale of the Hospital Stock, even though the sale had never been accomplished.

The reasons why the sale was not accomplished, and the circumstances involved do not shed any light on, or help to resolve, the problem now under consideration, and this phase will not be discussed.

The Bank asserts (1) that the funds in the Escrow Account do not constitute assets belonging to the bankrupt estate but are, in fact and law, the funds of Spence, claimed by him on his own behalf and on behalf of others for whom he acted; and, alternatively, (2) that if the same be not so and the funds be determined to belong to Balogh and Company, the Bank has a right of set off as a creditor of the Company.

The Bank further asserts that only two questions are presented:

"1. Are the funds in the 'Balogh & Company Escrow Account', which were deposited in the First National Bank of Arlington for the sole purpose of purchasing 6220 shares of stock of the hospital corporation, assets of the bankrupt which would pass to the Trustee in Bankruptcy?"

"2. If Question #1 is answered in the affirmative, does the First National Bank of Arlington have a right of set-off with the said funds?"

As to Question No. 1

The facts as stated by the Bank are reasonably correct as far as they go, but the Bank omits stating, or considering the effect of, facts showing who put up the $62,200, how that amount was raised, the circumstances surrounding the delivery of the money to the Company, the Bank's (O'Donnell's) letters and testimony as to the ownership of the fund, the Bank's acceptance of $50,000 from the fund to apply to the payment of the notes signed by the Doctors.

The authorities presented by the Bank in support of Spence's right to the whole amount of the fund are accurate statements of the basic law in those cases where there is no question as to the true owner of the money on deposit in an escrow account or trust fund and where the true owner has made timely and proper claim to the fund in a bankruptcy proceeding. However, this basic law must be applied to the facts in each case under consideration, and the facts in the present case do not establish the fact that Spence was the owner of the whole $12,200 or invested with any right or authority to collect or obtain the fund in a representative capacity for the other Doctors.

As to Question No. 2

The Bank relies on Section 68 of the Bankruptcy Act which provides that: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid."

The facts are not in dispute insofar as the Company's liability on the personal note of Balogh is concerned. The note signed by Balogh is the obligation of the Company. However, as of the date of Bankruptcy the $12,200 was not the property of the Trustee, and under Section 70a of the Bankruptcy Act "the date of the filing of the petition initiating a proceeding under this Act" is the date on which the rights of the parties are to be determined.

As of the date of bankruptcy, the Company was not the owner of these funds, so there could be no set-off of "mutual debts or mutual credits between the estate of the bankrupt and a creditor."

SUMMARY

The claim of Spence to the full sum of $12,200 on deposit in the Escrow Account is based on factual assumptions which are not supported by the evidence and conclusions of law which are erroneous.

There is no question that Spence placed the order for the purchase of 6220 shares of stock, but that was not the transaction which created the need to establish the Escrow Account. The Escrow Account was established after Spence and the Doctors through their Agent had each advanced funds for the purchase of the stock, had through their Agent advised the Company how the stock should be divided among, and issued to, the doctors participating in the purchase, had filed an action against the Hospital in their several names to require it to issue the stock to them in the proportions directed, and then had their Agent arrange with the Company to deposit the funds in an Escrow Account pending disposition of the suit.

Thus, the placing of the order for the stock was not the agreement under which the Escrow Account was created. The Escrow Account was created by, and on behalf of, all of the participating doctors through their Agent. On this basis, Spence cannot possibly qualify as "the real party in interest."

There is no evidence in this proceeding that the $12,200 was given, sold, transferred, assigned or released to Spence in any manner.

Section 96(e)(4) of Title 11, U.S.C.A., does not automatically give Spence a right to these funds. He must prove that he falls within the requirements of that Section. The facts clearly establish that Section 96(e)(4) does not give him any right to the $12,200 Escrow Account.

However, it has been clearly established that the $12,200 is the balance of an original fund of $62,200 deposited in the Escrow Account, in trust for the parties contributing to the fund. As of the date the petition initiating this bankruptcy proceeding was filed this fund of $12,200 was held by the Company in trust for the contributing doctors as their interests could be established, subject to whatever rights the Company could establish thereto on its claim for commissions.

The claim of the Trustee in Bankruptcy to outright ownership, or right to ownership, of the $12,200 on deposit in the Escrow Account is based on factual assumptions which have not been supported by the evidence. Had they been established by the evidence, they would have been of no avail to the Trustee since they were the basis of a compulsory counterclaim which the Company was required, but failed, to present in Civil Action 1757-61.

The Trustee in Bankruptcy, however, is entitled to the $12,200 fund, subject to appropriate proceedings on the part of any of the contributing doctors who may assert a proper claim to the same. In re Benevolent & Protective Order of Elks, Brooklyn Lodge, No. 22 (DC EDNY 1933) 3 F Supp 560.

The assertion of the First National Bank of Arlington to a right to set off its claim on the note for $9,000 signed by Balogh (the man) against the money on deposit in its Bank in the name Balogh & Company, Inc., Escrow Account must be settled on the basis of the ownership of, or title to, that account on August 19, 1964, the day the petition initiating this Bankruptcy proceeding was filed. As heretofore determined, on August 19, 1964, the $12,200 in the said Escrow Account was being held in trust by the Company subject to the outstanding interest of the beneficiaries. Under these circumstances there could not be a set off of mutual debts and mutual credits.

Between the Trustee and the Bank, the Trustee is entitled to the funds, subject to appropriate proceedings on the part of any of the contributing doctors who may assert a proper claim to the same. In re Benevolent & Protective Order of Elks, Brooklyn Lodge, No. 22, (D.C. E.D.N.Y. 1933) 3 F Supp. 560.

DISPOSITION OF PROCEEDINGS

1. The claim of Dr. William T. Spence to the $12,200 is denied.

2. The claim of the Trustee in Bankruptcy to the outright and unencumbered ownership of the $12,200 is denied.

3. The claim of the First National Bank of Arlington to a right of set-off of its $9,000 note owed by the Company against the $12,200 deposit in the Escrow Account is denied.

4. The $12,200 in the Escrow Account shall be forthwith turned over to the Trustee in Bankruptcy, subject to appropriate proceedings being initiated in this Court within thirty (30) days from the date of the order to be entered herein by any of the contributing doctors who believes he may have a proper claim to the same, and reserving to the Trustee in Bankruptcy any and all defenses, rights and counterclaims that he may assert against such claims.

5. The actions pending in Virginia and this Court against the Bankrupt, as described herein, shall be dismissed forthwith by counsel for Spence.

This Memorandum is to serve as the Findings of Fact and Conclusions of Law of this Court.

Counsel for the Trustee in Bankruptcy will present an appropriate Order at 9:30 o'clock a.m. on the 9th day of January, 1968.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

ORDER

1. Denying the claim of Dr. William T. Spence to $12,200 escrow deposit;
2. Denying the claim of the Trustee in Bankruptcy to the outright and unencumbered ownership of the $12,200 escrow deposit;
3. Denying the claim of the First National Bank of Arlington to a right of setoff of $9,000 promissory note of the bankrupt against the $12,200 escrow deposit;
4. Directing the First National Bank of Arlington to turn over the sum of $12,200 escrow deposit to the Trustee in Bankruptcy;
5. Directing initiation of appropriate proceedings by Dr. William T. Spence and other potential claimants to the escrow fund; and
6. Directing dismissal of pending actions against the bankrupt.

AT WASHINGTON, D. C., this 20th day of February, 1968.

This matter was initiated by the Trustee's Motion to Enjoin (1) Dr. William T. Spence, (a) plaintiff in Civil Action No. 2997-63 in this Court and (b) plaintiff in Attachment Action No. 96-86 in the Circuit Court of Arlington County, Virginia; and to enjoin (2) First National Bank of Arlington; and (3) for an order to show cause why the escrow deposit in said bank should not be turned over to the Trustee in Bankruptcy; and, upon consideration of the timely answers filed by Dr. Spence and the First National Bank of Arlington, the testimony and evidence adduced upon hearing held on pleadings filed, the oral argument and written memoranda of counsel for the respective parties, this Court prepared an exhaustive memorandum of findings of fact and conclusions of law under date of December 29, 1967, and has furnished counsel for the respective parties a copy thereof. Subsequently on February 15, 1968, the parties filed an Agreed Statement of Additional Facts for the purpose of correcting errors in the December 29,

1967 Memorandum, and, on February 20, 1968, this Court prepared a supplemental memorandum correcting the errors established by the additional facts presented and by a typographical error, involving an amount of money, made by the Referee in Bankruptcy. Said Memorandum of December 29, 1967, as corrected by the supplemental memorandum dated February 20, 1968 is adopted and incorporated herein by reference as if fully set forth herein as the Court's findings of fact and conclusions of law. WHEREUPON, IT IS

ORDERED:

1. That the claim of Dr. William T. Spence to the full balance of $12,200 in the Balogh & Company, Inc., escrow account in the First National Bank of Arlington is denied;

2. That the claim of Edward J. McGrath, Trustee in Bankruptcy, to the outright and unencumbered ownership of the said escrow balance of $12,200 in the Balogh & Company, Inc., escrow account is denied;

3. That the claim of the First National Bank of Arlington to a right of setcff of its $9,000 note owed by Balogh & Company, Inc., against the $12,200 deposit in the escrow account is denied;

4. That the $12,200 escrow account shall be turned over by the First National Bank of Arlington to Edward J. McGrath, Trustee in Bankruptcy, upon entry of this Order, subject to the initiation in this Court in this proceeding, within 30 days from the dateof entry of this Order, by Dr. William T. Spence, Dr. John T. Hazel, Dr. William D. Dolan, Dr. Raymond Schwartz, and Dr. Arthur V. Mitchell, or any of them (doctors apparently contributing to said escrow fund), by appropriate pleading undertaking to establish their claim(s) to the sum of $12,200 in the hands of the Trustee resulting from turnover by the First National Bank of Arlington to the Trustee of the said balance in the Balogh & Company, Inc. escrow account, and reserving to the

Trustee in Bankruptcy any and all defenses, rights and counterclaims that he may assert against such proceedings. Provided, however, that in the event all or any of said contributing doctors shall fail within the time provided to file appropriate pleading(s) asserting entitlement to a portion of said escrow fund, then any claim(s) of such individual(s) is hereby deemed upon such failure to be forever barred against the said fund, the Trustee in Bankruptcy herein, the bankrupt corporation, or the First National Bank of Arlington;

5. That (a) Civil Action No. 2997-63, initiated by Dr. William T. Spence against the bankrupt herein in this Court, and (b) Attachment Action No. 96-86 initiated by Dr. William T. Spence against the bankrupt herein in the Circuit Court of Arlington County, Virginia, be and the same hereby are directed to be dismissed by counsel for Dr. William T. Spence, plaintiff in said suits, forthwith upon entry of this Order;

6. That upon entry of this Order, a Clerk of this Court shall serve by franked mail a certified copy hereof upon each of the following at the addresses shown, and shall certify to the mailing thereof:

Dr. William T. Spence
1234 - 19th Street, N.W.
Washington, D. C. 20036

Dr. John T. Hazel
220 Culpeper Street
Warrenton, Virginia

Dr. William D. Dolan
5129 - 16th Street, North
Arlington, Virginia 22205

Dr. Raymond Schwartz
1029 N. Stuart Street
Arlington, Virginia 22201

Dr. Arthur V. Mitchell
4682 - 34th Street, South
Arlington, Virginia

Cornelius H. Doherty, Sr., Esq.
Attorney for Dr. Spence
1010 Vermont Avenue, N.W.
Washington, D. C. 20005

Peter J. Kostik, Esquire
Attorney for First National Bank of Arlington
2046 Wilson Blvd.
Arlington, Virginia

Edward J. McGrath, Esquire
Trustee in Bankruptcy
401 Tower Building
Washington, D. C. 20005

Samuel M. Greenbaum, Esquire
Attorney for the Trustee
401 Tower Building
Washington, D. C. 20005

John C. Brennahan
REFEREE IN BANKRUPTCY

(c) Certified Copy sent to the above-named
on the 20 day of February 1968

M. O. Pinnock
Clerk

March 12, 1968

Cornelius H. Doherty Esq.
1010 Vermont Avenue, N.W.
Washington, D. C. 20005

Re: Balogh & Company, Inc.
Bankruptcy No. 69-64

Dear Mr. Doherty:

I am returning the petitions to reclaim property presented for filing on behalf of John T. Hazel, William D. Dolan, William T. Spence and Raymond Schwartz.

Please be advised that Rule 68(b) of the U. S. District Court Rules provides as follows:

"No petition for reclamation shall be filed or accepted for filing later that 10 days after the first date set for the first meeting of creditors without prior order of the Court granting leave to file such petition. Such an order shall be sought by the filing of a verified application to which is appended the petition sought to be filed and a copy thereof shall be served forthwith on the trustee. The said application requesting leave to file shall state the reason for failure to file timely, the present status of the property sought to be reclaimed, the date and manner of giving of any prior notice of such claim to the Court or any of its officers, and, in addition, said application shall set forth the manner by which the Court can order the reclamation if the petitioner be entitled thereto without prejudice to the estate. The Court may grant or deny the application to file, without hearing, upon consideration of the application requesting leave to file and the attached petition for reclamation. If the Court deny the application for leave to file the petition for reclamation, the same shall act as a bar order as in the case of a petition for reclamation dismissed prior to hearing. No such bar order shall prohibit the aggrieved party from filing a proof of claim, provided the same claim is provable and in conformity with the Bankruptcy Act, General Orders and forms and these rules."

I am also enclosing the check presented by Mr. Attridge.

Cordially,

FILED
MAR 12 1968
JOHN A. BRESNAHAN
REFEREE IN BANKRUPTCY

Nancy A. Piwonski (Mrs.)
Clerk for Referee

enc.

[Caption Omitted in Printing]

MOTION FOR LEAVE TO FILE PETITION TO RECLAIM PROPERTY FROM TRUSTEE

Comes now the petitioner, William T. Spence, by and through his attorney, and moves this Court for an order granting leave to file a petition to reclaim property from the Trustee, and for reasons therefore says:

1. On February 20, 1968, this Court ordered the First National Bank of Arlington to turn over to Edward J. McGrath, Esquire, Trustee in Bankruptcy of Balogh & Company, Inc., the sum of $12,200.00, which the bank was holding in an escrow account in the name of Balogh & Company, Inc., in order that any of the doctors who felt they had an interest in that fund may make a proper claim to the same; the Court further ordered that the doctor petitioners were authorized to institute appropriate proceedings to reclaim these funds within thirty (30) days from the date of its order. Your petitioner is one of the doctors who contributed funds to this account. Pursuant to the order of February 20, 1968, Edward J. McGrath, Esquire, Trustee, received or was entitled to receive from the First National Bank of Arlington the sum of $12,200.00, which sum had been on deposit with said bank in an escrow account of Balogh & Company. The petition to reclaim the funds from the trustee was not filed at an earlier date because at the time of the first date set for the meeting of creditors of the bankrupt the sums, which are presently sought to be reclaimed, were not in the possession of the Trustee and, therefore, any petition to reclaim these funds from the Trustee at that time would have been of no avail. The Court, in its memorandum opinion of January, 1968, determined that these funds which had been on deposit in an escrow

account with the First National Bank of Arlington, were not part of the assets of the bankrupt.

2. The property which is being sought to be reclaimed is currency and in the constructive possession of Edward J. McGrath, Esquire, Trustee.

3. Prior notices of the petitioner's claim to such property were made known by virtue of a suit filed on December 16, 1963, by the petitioner, William T. Spence, against Balogh & Company in the United States District Court for the District of Columbia, Civil Action No. 2997-63, which action is a part of the proceedings now before this Court, and by virtue of a suit filed on March 30, 1964, by the petitioner, William T. Spence, against Balogh & Company in the Circuit Court of Arlington County, Virginia, Attachment Action No. 96-36, and by virtue of a letter dated April 22, 1964, addressed to the First National Bank of Arlington, advising the latter that the right, title and interest of the petitioners, William D. Dolan, John T. Hazel and Raymond Schward and William T. Spence, to the funds on deposit with the First National Bank of Arlington in the Balogh & Company escrow account have been assigned to William T. Spence. On November 20, 1964, the First National Bank of Arlington advised counsel for the petitioner that there was on deposit ". . . a balance of $12,200.00 which is held in trust for the doctors . . ."

4. Since the property sought to be recovered is currency, this Court can enter an order directing Edward J. McGrath, Esquire, Trustee of Balogh & Company, Inc., to pay over to the petitioner the sum sought to be reclaimed by him.

Cornelius H. Doherty

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

RESPONSE TO MOTION FOR LEAVE TO FILE PETITION TO RECLAIM PROPERTY
(Filed on behalf of Dr. William T. Spence)

Edward J. McGrath, duly appointed and qualified Trustee in Bankruptcy, for his response to the Motion for Leave to File Petition to Reclaim Property filed herein on behalf of Dr. William T. Spence, respectfully represents:

1. Said motion fails to comply with Rule 68(b) of the Rules of the United States District Court for the District of Columbia in that:

(a) It is unverified.

(b) The Motion fails to allege an adequate basis for failure to have timely filed the Petition to Reclaim Property from Trustee in that the petitioner seeks payment of $4,000.00 advanced which was deposited in the Balogh & Company, Inc. escrow account in the First National Bank of Arlington, which account was in the constructive possession and control of the bankrupt on the date of bankruptcy and continued in such status from the appointment and qualification of your Trustee to date.

(c) The issue as to petitioner's entitlement to the total fund was decided by this court in its order of February 20, 1968, incorporating its Memorandum Opinion of December 29, 1967, wherein this court denied the c claim of Dr. William T. Spence to the $12,200.00 balance (Memorandum, page 32). Accordingly, any claim of Dr. Spence to any portion of the fund not having been asserted and proved in the hearing held under this court's Order to Show Cause, the same being a necessary counterclaim to Trustee's Motion to Enjoin (1) William T. Spence, et al., and for Order to Show Cause why the Escrow Deposit in Said Bank Should Not be Turned Over to the Trustee, is now res adjudicata.

(d) And for such other reasons as may be asserted at the time of hearing upon the Motion for Leave to File Petition to Reclaim Property from Trustee.

WHEREFORE, premises considered, it is prayed that this court dismiss with prejudice the Motion for Leave to File Petition to Reclaim Property from Trustee, filed herein on behalf of Dr. William T. Spence.

Edward J. McGrath
Trustee in Bankruptcy

Samuel M. Greenbaum
Attorney for Trustee
401 Tower Building
Washington, D. C. 20005
Telephone: 347-2626

[Certificate of Service Omitted in Printing]

FILED
MAY - 7 1968
JOHN A. BRESNAHAN
REFEREE IN [illegible]

SUBSTITUTE MOTION FOR LEAVE TO FILE PETITION TO RECLAIM PROPERTY FROM TRUSTEE

Comes now the petitioner, William T. Spence, by and through his attorney, and moves this Court for an order granting leave to file a petition to reclaim property from the Trustee, and for reasons therefore says:

1. On February 20, 1968, this Court ordered the First National Bank of Arlington to turn over to Edward J. McGrath, Esquire, Trustee in Bankruptcy of Balogh & Company, Inc., the sum of $12,200.00, which the bank was holding in an escrow account in the name of Balogh & Company, Inc., in order that any of the doctors who felt they had an interest in that fund may make a proper claim to the same; the Court further ordered that the doctor petitioners were authorized to institute appropriate proceedings to reclaim these funds within thirty (30) days from the date of its order. Your petitioner is one of the doctors who contributed Four Thousand ($4000.00) Dollars to this account. Pursuant to the order of February 20, 1968, Edward J. McGrath,

Esquire, Trustee, received or was entitled to receive from the First National Bank of Arlington the sum of $12,200.00, which sum had been on deposit with said bank in an escrow account of Balogh & Company. The petition to reclaim the funds from the trustee was not filed at an earlier date because at the time of the first date set for the meeting of creditors of the bankrupt the sums, which are presently sought to be reclaimed, were not in the possession of the Trustee and, therefore, any petition to reclaim these funds from the Trustee at that time would have been of no avail. The Court, in its memorandum opinion of January, 1968, determined that these funds which had been on deposit in an escrow account with the First National Bank of Arlington, were not part of the assets of the bankrupt.

2. The property which is being sought to be reclaimed is currency and in the constructive possession of Edward J. McGrath, Esquire, Trustee.

3. Prior notice of the petitioner's right to the claimed property was made known to this Court and to the Trustee appointed in this matter when he filed an order to show cause why the escrow deposit in the First National Bank of Arlington, which was placed therein for the sole purpose of purchasing certain stock on behalf of various persons, including your petitioner, by the bankrupt, should not be made a part of the assets of the bankrupt estate. There was produced in this Court on the hearing of the Trustee's motion sworn testimony of witnesses that the funds in the First National Bank of Arlington were placed therein for the sole purpose of purchasing stock of the Northern Virginia Doctors Hospital Corporation, which the bankrupt failed to do, and in the sworn testimony, which appears noted in the memorandum of the Referee in Bankruptcy filed in this cause, that your petitioner, in addition to signing the

promissory note to the First National Bank of Arlington, deposited cash in the sum of Four Thousand ($4000.00) Dollars which was being held by the First National Bank of Arlington on your petitioner's behalf.

4. Your petitioner could not have filed a claim for any part of this property in the bankruptcy proceedings for the property was not a part of the bankruptcy proceedings until after the order was entered herein on the 20th day of February, 1968.

Your petitioner moves the Court for leave to file his petition to reclaim his part of the property which came within the jurisdiction of the Bankruptcy Court after the order of February 20, 1968.

William T. Spence
Petitioner

Cornelius H. Doherty
1010 Vermont Avenue, N. W.
Washington, D.C. 20005
NAtional 8-6257
Attorney for Petitioner

DISTRICT OF COLUMBIA, SS:

William T. Spence, being first duly sworn on oath, deposes and says that he is the petitioner named in the foregoing petition and that the information contained therein is true.

William T. Spence

[Jurat Omitted in Printing]

SUBSTITUTE MOTION FOR LEAVE TO FILE PETITION TO RECLAIM PROPERTY FROM TRUSTEE

Comes now the petitioner, William D. Dolan, by and through his attorney, and moves this Court for an order granting leave to file a petition to reclaim property from the Trustee, and for reasons therefore says:

1. On February 20, 1968, this Court ordered the First National Bank of Arlington to turn over to Edward J. McGrath, Esquire, Trustee in Bankruptcy of Balogh & Company, Inc., the sum of $12,200.00, which the bank was holding in an escrow account in the name of Balogh & Company, Inc., in order that any of the doctors who felt they had an interest in that fund may make a proper claim to the same; the Court further ordered that the doctor petitioners were authorized to institute appropriate proceedings to reclaim these funds within thirty (30) days from the date of its order. Your petitioner is one of the doctors who contributed Four Thousand ($4000.00) Dollars to this account. Pursuant to the order of February 20, 1968, Edward J. McGrath, Esquire, Trustee, received or was entitled to receive from the First National Bank of Arlington the sum of $12,200.00, which sum had been on deposit with said bank in an escrow account of Balogh & Company. The petition to reclaim the funds from the trustee was not filed at an earlier date because at the time of the first date set for the meeting of creditors of the bankrupt the sums, which are presently sought to be reclaimed, were not in the possession of the Trustee and, therefore, any petition to reclaim these funds from the Trustee at that time would have been of no avail. The Court, in its memorandum opinion of January, 1968, determined that these funds which had been on de-

posit in an escrow account with the First National Bank of Arlington, were not part of the assets of the bankrupt.

2. The property which is being sought to be reclaimed is currency and in the constructive possession of Edward J. McGrath, Esquire, Trustee.

3. Prior notice of the petitioner's right to the claimed property was made known to this Court and to the Trustee appointed in this matter when he filed an order to show cause why the escrow deposit in the First National Bank of Arlington, which was placed therein for the sole purpose of purchasing certain stock on behalf of various persons, including your petitioner, by the bankrupt, should not be made a part of the assets of the bankrupt estate. There was produced in this Court on the hearing of the Trustee's motion sworn testimony of witnesses that the funds in the First National Bank of Arlington were placed therein for the sole purpose of purchasing stock of the Northern Virginia Doctors Hospital Corporation, which the bankrupt failed to do, and in the sworn testimony, which appears noted in the memorandum of the Referee in Bankruptcy filed in this cause, that your petitioner, in addition to signing the promissory note to the First National Bank of Arlington, deposited cash in the sum of Four Thousand ($4000.00) Dollars which was being held by the First National Bank of Arlington on your petitioner's behalf.

4. Your petitioner could not have filed a claim for any part of this property in the bankruptcy proceedings for the property was not a part of the bankruptcy proceedings until after the order was entered herein on the 20th day of February, 1968.

Your petitioner moves the Court for leave to file his petition to reclaim his part of the property which came within the jurisdiction of the

Bankruptcy Court after the order of February 20, 1968.

William D. Dolan
Petitioner

Cornelius H. Doherty
1010 Vermont Avenue, N. W.
Washington, D. C. 20005
NAtional 8-6257
Attorney for Petitioner

DISTRICT OF COLUMBIA, SS:

William D. Dolan, being first duly sworn on oath, deposes and says that he is the petitioner named in the foregoing petition and that the information contained therein is true.

William D. Dolan

Subscribed and sworn to before me this 7 day of May, 1968.

Notary Public, D. C.

My Commission Expires Jan. 31, 1972

[Caption Omitted in Printing]

MEMORANDUM OF REFEREE IN BANKRUPTCY

(Motions for Leave to File Petitions to Reclaim Property)

This matter came on for hearing upon the motions of Drs. Raymond Schwartz, Hazel, Dolan and Spence for leave to file petitions to reclaim $12,200 held by the bankrupt in an escrow account in the First National Bank of Arlington and now in the possession of the Trustee in Bankruptcy.

Drs. Schwartz, Dolan and Spence each claim to be entitled to $4,000 of said account, and Dr. Hazel claims to be entitled to $1,000.

The Trustee in Bankruptcy urges that the motions be dismissed with prejudice. As to Drs. Schwartz, Dolan and Hazel, he argues that the motions fail to comply with Rule 68(b) of the Rules of this Court, in that: (1) the reason assigned by each of these doctors for failure to timely file a Petition for Reclamation is contrary to facts known to this Court, i.e., that Drs. Schwartz, Dolan and Hazel never, prior to the filing of the Motions for Leave to File Petition to Reclaim Property, ever demanded or made claim to the refund of any portion of the Balogh & Company, Inc., escrow account previously maintained in the First National Bank of Arlington, and (2) the motions fail to state the date and manner in which each of these doctors gave any prior notice of such claim to the Court or to the Trustee in Bankruptcy.

As to Dr. Spence, the Trustee argues that the motion fails to comply with Rule 68(b) of the Rules of this Court, in that (1) it fails to allege an adequate basis for failure to have timely filed the Petition to Reclaim Property from the Trustee in Bankruptcy, and (2) the issue as

to Dr. Spence's entitlement to the total fund was decided by this Court in its Order of February 20, 1968, wherein this Court denied the claim of Dr. Spence to the whole $12,200, and that such denial makes any claim to a portion of such fund res adjudicata.

Local Rule 68, which relates exclusively to Reclamations, is divided into two parts. Part (a) pertains to petitions for reclamation, the contents of the petition, fees, filing, service and matters related to the same, including the following:

> "When a claim is made to property in possession of the bankrupt, receiver or trustee, the claimant shall file a petition with the Referee duly verified by the claimant, his agent or attorney, setting forth a detailed description of the property claimed, his interest therein and a full statement of the facts upon which his claim to possession of said property is based and said petition shall be accompanied by the payment of $10.00 costs. ... ."

Part (b) of Local Rule 68, pertains to the time for filing a petition for reclamation, and the procedure to follow in obtaining permission to filing such a petition after the time for filing, as provided by the Rule, has passed. This part of the Rule reads as follows:

> "(b) Filing - Bar Order. No petition for reclamation shall be filed or accepted for filing later than 10 days after the first date set for the first meeting of creditors without prior order of the Court granting leave to file such petition. Such an order shall be sought by the filing of a verified application to which is appended the petition sought to be filed and a copy thereof shall be served forthwith on the trustee. The said application requesting leave to file shall state the reason for failure to file timely, the present status of the property sought to be reclaimed, the date and manner of giving of any prior notice of such claim to the Court or any of its officers, and, in addition,

> said application shall set forth the manner by which the Court can order the reclamation if the petitioner be entitled thereto without prejudice to the estate. The Court may grant or deny the application to file, without hearing, upon consideration of the application requesting leave to file and the attached proposed petition for reclamation. If the Court deny the application for leave to file the petition for reclamation, the same shall act as a bar order as in the case of a petition for reclamation dismissed prior to the hearing. No such bar order shall prohibit the aggrieved party from filing a proof of claim provided the same claim is provable and in conformity with the Bankruptcy Act, General Orders and Forms and these rules."

In the usual application for leave to file a reclamation petition subsequent to "10 days after the first date set for the first meeting of creditors" there is seldom any reason for denying the application since the facts and the acts and conduct of the parties making the application are not questioned by the Court, if it acts ex parte, or by the trustee in bankruptcy, if the matter comes on for hearing.

Unfortunately, in the present matters we are confronted by a record in this proceeding which strongly suggests that we might be faced with some very serious problems, including perjury, a fraudulent claim, and practicing a fraud upon the Court. Consequently, we are faced with the task of examining the statements presented under oath by the applicants for leave to file a reclamation petition against the record in this proceeding as it involves the applicants, collectively or individually.

This Court avoided going into any of these same problems in prior proceedings, but under the circumstances now existing it now becomes necessary to take them into consideration. This will be done, but only insofar as it is absolutely necessary, since the entire record in this bankruptcy proceeding will speak for itself.

Chronologically, the following times are of great importance to a resolution of the problems presented:

September 18, 1959. Prior to this, Drs. Spence, Dolan, Schwartz, Hazel, and another doctor not party to the present proceedings, delivered to Balogh & Company the sum of $62,200 to purchase 6,220 shares of stock being offered by the Northern Virginia Doctors Hospital. For reasons not of importance to this proceeding, the purchase was not consummated.

September 18, 1959. On this date Drs. Hazel, Schwartz, Spence, and Dolan, alleging that they (and another doctor) were the purchasers of 6,220 shares of stock of the Northern Virginia Doctors Hospital, file a suit in the Circuit Court of Arlington County, Virginia, Chancery No. 10899, against the Hospital, its President and Secretary, to compel the Hospital to issue the stock purchased by the plaintiffs. Drs. Dolan, Spence, Schwartz, and Hazel were represented by Cornelius H. Doherty, Esq., in this litigation.

September 22, 1959. On this date, by agreement between the President of the First National Bank of Arlington, acting on behalf of certain doctors, including Drs. Dolan, Schwartz, Hazel and Spence, and Stephen E. Balogh, President of Balogh & Company, Inc., Balogh & Company opened an account with the First National Bank of Arlington, under the name of Balogh & Company, Inc., Escrow Account, and deposited therein the $62,200 pending the outcome of the litigation between Drs. Spence, Hazel, Schwartz and Dolan and the Northern Virginia Doctors Hospital over the issuance of the stock, subject to withdrawal only for the purchase of the stock and payment of commissions to Balogh & Company by check issued by the Company payable only upon the specific approval of the President of the First National Bank of Arlington, "acting as de facto trustee for the doctors who had advanced the funds."

January 16, 1961. On this date, the Supreme Court of Appeals of Virginia, on an appeal by Dr. Spence only, affirmed the judgment of the Circuit Court of Arlington County, Virginia, which denied relief to Drs. Hazel, Schwartz, Spence and Dolan in their action (commenced on September 18, 1959) to compel the issuance of the stock purchased by the doctors through Balogh & Company. Among other things, the appellate court ruled that Dr. Spence, having claimed 1,900 shares in the Circuit Court action could not, on an appeal, attempt to recover all of the shares ordered. Spence v. Northern Virginia Doctors Hospital Corporation, 202, Va. 478, 117 S.E. 2d 657 (1961). Dr. Spence was represented by Cornelius H. Doherty, Esquire. (NOTE: Hazel, Dolan, Schwartz start Circuit Court action but do not go through on appeal.)

June 5, 1961. On this date, Dr. Spence filed suit against Balogh & Company in the United States District Court for the District of Columbia, Civil Action No. 1757-61, to require the Company to deliver 6,220 shares of Northern Virginia Doctors Hospital stock and to pay $15,000 for reimbursement of monies expended and attorneys' fees or, alternatively, to recover money damages totaling $201,600.00. Dr. Spence was represented by Cornelius H. Doherty, Esquire. (NOTE: Spence alleges he delivered $62,200 to Balogh, "with written instructions as to whom certificates representing sixty-two hundred twenty (6,220) shares of the stock so purchased were to be issued.")

April 25, 1963. On this date, the United States Court of Appeals, District of Columbia Circuit, affirmed the judgment of the District Court in Spence v. Balogh & Company, Inc., Civil Action No. 1757-61 for the reasons given in the opinion of District Judge Jones dismissing the action on its merits after trial. A petition for rehearing was denied on May 28,

1963. Spence v. Balogh & Company, Inc., 115 U.S. App. D.C. 209 (1963), 317 Fed. 909; Cert. Den. October 14, 1963, 375 U.S. 823, 84 D. Ct. 67, 11 L. Ed. 2d 58. Dr. Spence was represented by Cornelius H. Doherty, Esquire.

December 16, 1963. On this date, a suit was filed by Dr. Spence against Balogh & Company in the United States District Court for the District of Columbia, Civil Action No. 2997-63, seeking recovery of the $12,200 remaining in the Balogh & Company, Inc., Escrow Account in the First National Bank of Arlington. Dr. Spence alleges that he purchased the 6,220 shares of Northern Virginia Doctors Hospital stock from Balogh & Company; that he delivered the sum of $62,200 to the Company; that the Company had failed and refused to release the balance of $12,200 to him. Dr. Spence was represented by Cornelius H. Doherty, Esquire.

March 30, 1964. On this date a notice of Motion for Judgment was filed in Attachment Action No. 96-86 in the Circuit Court for Arlington County, Virginia, and thereafter the funds in the First National Bank of Arlington in the name of "Balogh & Company Escrow Account" in the sum of $12,200 were attached. This suit was filed by Dr. Spence against Balogh & Company, Stephen E. Balogh and the First National Bank of Arlington. (NOTE: This was pending when bankruptcy commenced.)

April 22, 1964. On this date, Drs. Dolan, Schwartz and Hazel gave a letter to the First National Bank of Arlington consenting to the Bank filing an answer in the matter pending in the Circuit Court of Arlington County (Attachment Action No. 96-86), stating that the funds in the Escrow Account belonged to Dr. Spence.

August 19, 1964. On this date Balogh & Company, Inc., filed its voluntary bankruptcy petition in this Court. Among the creditors scheduled was Dr. William T. Spence as party plaintiff in Civil Action No. 2997-63, and Attachment Action 96-86, and notice of the first meeting of creditors was mailed to Dr. Spence at 3715 Idaho Avenue, N.W., Washington, D. C. Among the assets scheduled was the $12,200 account in the First National Bank of Arlington, noted as subject to attachment action of Dr. Spence.

August 26, 1964. On this date, the notice of the first meeting of creditors, to be held on September 10, 1964, was mailed to all creditors, including Dr. Spence. (NOTE: Dr. Spence received notice of 1st meeting.)

September 10, 1964. On this date, the first session of the first meeting of creditors was held and the Trustee in Bankruptcy was appointed. Neither Dr. Spence or his attorney, Mr. Doherty, attended this meeting or any of the continued sessions thereof.

September 17, 1964. On this date, the Trustee in Bankruptcy filed herein his Motion to Enjoin (1) William T. Spence, (a) Plaintiff, Civil Action 2997-63, United States District Court for the District of Columbia, and (b) Plaintiff, Attachment Action No. 96-86, Circuit Court of Arlington County, Virginia, and to enjoin (2) First National Bank of Arlington, and (3) for Order to Show Cause why the Escrow Deposit in said bank should not be turned over to the trustee.

September 17, 1964. On this date, an Order was entered, ex parte, restraining Dr. Spence, his agents, attorneys and representatives from pursuing further action in Civil Action 2997-63 and Attachment Action No. 96-86, or from commencing any further or other action, other than in

the bankruptcy proceeding, relating to or in respect to claim or claims subject to the above-identified plenary actions; and directing Dr. Spence to show cause on October 20, 1964, why he should not be premanently so enjoined. A certified copy of the Order and the Motion was served upon Cornelius H. Doherty, Esq., attorney for Dr. Spence on the same day. (NOTE: There is now no doubt that Dr. Spence has notice of bankruptcy.)

October 15, 1964. On this date, Cornelius H. Doherty, Esquire, as attorney for Dr. Spence, filed an answer herein to the Order to Show Cause in which he also sought an order directing the Trustee to release the $12,200 escrow fund to Dr. Spence, and for dismissal of Balogh & Company's counterclaim in Civil Action 2997-63. Attached to Mr. Doherty's answer was an "Argument" and a "Memorandum."

October 22, 1964. On this date, the hearing required by the Order to Show Cause was heard.

October 27, 1964. On this date, an Order was entered in connection with the October 22, 1964 hearing, a copy of which was served on Dr. Spence and a copy served on his attorney, Mr. Doherty.

November 20, 1964. On this day, the president of the First National Bank of Arlington, advised Dr. Spence's attorney, Cornelius H. Doherty, Esq., in response to Mr. Doherty's request for information relative to the status of the Balogh & Company, Inc., Escrow Account, in part, as follows:

> "There is today a balance of $12,200, which is still held in trust for the doctors, and our Bookkeeping Department is still under strict orders not to pay against this account without specific authority from the undersigned." (underscoring supplied.)

December 1, 1964. On this date the Trustee in Bankruptcy and Dr. Spence, through his counsel, Cornelius H. Doherty, Esq., filed herein an "Agreed Statement of Facts" which among other things sets forth the following:

> 1. From a letter dated September 16, 1959, president of First National Bank of Arlington to Stephen E. Balogh (in part): "I am happy you have agreed to open an escrow account with us carrying the $62,200.00 ... pending the outcome of the current litigation. This will relieve the doctor purchasers of interest charges on the money borrowed for the purchase of the stock." (p. 10) (Underscoring supplied.)

December 29, 1964. On this date, counsel for Dr. Spence filed an "Additional Statement of Facts" in accordance with a request received from the Trustee in Bankruptcy. This reads, in part, as follows[1]:

> "3. Request No. 3 is for all facts upon which Dr. William T. Spence claims to be entitled to the entire $12,200.00 now on deposit in the First National Bank of Arlington, and counsel now states that to his knowledge there are no facts other than those which have previously been submitted, with the following additions:
>
> * * *
>
> "Dr. Spence, on examination by his counsel ... stated as follows:
>
> * * *
>
> Q. At the time you bought this stock, the 6,220 shares, did you have any understanding with anybody as to their receiving any particular amount?
>
> A. No; that was a very loose arrangement. ... There was never any indication as to the exact amount. ... There was never any set agreement on any of the amounts or how much it would cost, or how many shares they would take. ... "
>
> * * *

"Q. Dr. Spence, when you purchased ... these shares of stock ..., where did the funds for the purchase come from?

"A. From the First National Bank of Arlington.

* * *

"Q. And did the First National Bank of Arlington provide the full total of $62,200.00?

"A. Yes; they provided it on security of notes signed by me and others, plus cash that was put up by myself and others.

* * *

"Q. Were you a - - did you put up any cash?

"A. Yes.

"Q. Do you remember how much that was?

"A. No; I don't."

* * *

"5. In response to request No. 5, there is submitted the following excerpts from the testimony of Walter J. O'Donnell, the President of the First National Bank of Arlington, and in answer to certain questions put to him by counsel for the bankrupt he gave the following testimony, commencing on page 173 of the transcript.[2]

* * *

"Q. And can you state briefly and generally the nature of the transaction as it was established that day with respect to the advance of these funds? I have in mind, did any of the doctors put in any cash? Did they borrow some money? The totals, if you can give them to us.

"A. The doctors put in some cash. Dr. Hazel advanced $1,000; Drs. Spence, Dolan, Schwartz and Bastien each put up $4,000 apiece - or a total of $17,000. And among the doctors they signed notes for $45,200 - or a total of $62,200, against which we drew a cashier's check payable to Balogh & Company."

(1 & 2 - Excerpts from testimony taken from transcript of the case of Spence v. Balogh, Civil Action 1757-61)

February 8, 1965. On this date, Cornelius H. Doherty, Esquire, attorney for Dr. Spence filed the "Reply of Spence to Trustee's Memorandum. In this document, the following statements, among others, appear:

> 1. "In this same paragraph the trustee indicates that by the giving of a check by Balogh to the bank in the sum of $50,000 it paid off these notes and part of any claim that Spence might have, disregarding a little bit of arithmetic which disclosed that $12,200.00 had been paid in cash and that the bank has specifically referred to this sum as being held in trust for the interested doctors. There is definitely nothing to indicate that even if Spence was not entitled to this money Balogh was." (p. 3) (Underscoring supplied.)

> 3. "Referring to the last paragraph on page 7 of the trustee's memorandum, there is nothing in this record, or elsewhere, which would indicate that Spence does not have a right to the $12,200.00 in the escrow account, for in the agreed statement of facts we have the definite statement from Dolan, Hazel and Schwartz that they release any right to this fund so that the bank may answer that it belongs to Spence. The fact that Dolan, Hazel and Schwartz did not appeal from the decision in the trial Court in the Virginia proceeding did not make any claim that they may have against Balogh or the fund as res judicata." (p. 5)

February 8, 1965. On this date, Dr. Spence, through his attorney, Cornelius H. Doherty, Esquire, filed his memorandum in support of his position on the issue raised by the Rule to Show Cause. At page 7 he commences the argument to the proposition that Dr. Spence is the real party in interest and entitled to the whole $12,200, and here again he relies on the letter from Dolan, Schwartz, and Hazel to the Bank author-

izing it to answer a suit by Spence against Balogh by stating the $12,200 belonged to Dr. Spence.

March 10, 1965. On this date, the statutory time for filing proofs of claim expired.

With this chronology of events before us it is not difficult to ascertain that there was (1) ample opportunity following the receipt of the August 26, 1964 notice of the first meeting of creditors, and September 10, 1964, the date of the first meeting of creditors, for Dr. Spence and/or Cornelius H. Doherty, Esq., his counsel, to have arranged to attend and participate in the first meeting of creditors, thus enabling Dr. Spence to present his claim and the claims of the other doctors to the Trustee in Bankruptcy and the Court; (2) a period of time beginning a few days after August 26, 1964, when Dr. Spence received notice of the first meeting of creditors, and extending over a period of more than six months ending March 10, 1965, when the time for filing claims expired, that Dr. Spence could have filed a proof of claim in this bankruptcy proceeding, and in which Cornelius H. Doherty, Esq., as attorney for Drs. Dolan, Hazel and Schwartz, could have obtained proofs of claim from these clients and filed them in this proceeding; (3) a period of time beginning a few days after August 26, 1964, when Dr. Spence received notice of the first meeting of creditors, and extending until September 20, 1964, being 10 days after the first date set for the first meeting of creditors, during which Dr. Spence could have filed his petition to reclaim whatever amount was properly due him from the Escrow Account, and during which Cornelius H. Doherty, Esq., could have caused reclamation petitions to be filed on behalf of his clients, Drs. Dolan, Schwartz and Hazel; and (4) ample opportunity for Dr. Spence to have filed a proof of claim or a reclamation

petition within the time limits established by the Bankruptcy Act (§57n) and the Local Rules /Rule 68(a)/, or to amend his basis for asserting a claim to the $12,200 as reflected in Civil Action No. 2997-63 and Attachment Action No. 96-86, by asserting a claim for the proper amount due him and by having Drs. Dolan, Schwartz and Hazel assert claims for the proper amounts due them, before he responded to the Show Cause Order on October 15, 1964.

However, Dr. Spence and his attorney, and the attorney for Drs. Dolan, Schwartz and Hazel, elected not to take advantage of these opportunities, but, instead, proceeded to assert a claim that proved to be obviously false, fictitious, and based on a device which he and/or his attorney had contrived and which they could not help but know was improper and not based on the true facts as they existed.

By such action Dr. Spence and his counsel perpetrated a fraud on this Court and had attempted to perpetrate a fraud on the Courts in Civil Action No. 2997-63 and Attachment Action No. 96-86.

This Court heretofore found in the prior proceeding arising under the Rule to Show Cause, the following facts: (1) that Dr. Spence had made a claim to the whole Escrow Account, amounting to $12,200, by means of Civil Action No. 2997-63 in this Court, and Attachment Action No. 96-86 in the Circuit Court of Arlington County, Virginia, which he failed to establish under the Rule to Show Cause, but in the course of which proceeding it was made to appear that he did contribute $4,000 cash to the original $62,200 fund; and (2) with $1,800 of the $50,000 released to the First National Bank of Arlington unaccounted for, and Dr. Spence's reluctance to admit that he did contribute $4,000 cash to that fund, and his insistence that he was entitled to the whole $12,200,

this Court was without sufficient information to make a determination of Dr. Spence's right to any part of the $12,200 remaining.

While Drs. Dolan, Schwartz, and Hazel were not quite so deeply involved in this scheme, they did conspire and connive with Dr. Spence and his, and their, attorney, Cornelius H. Doherty, Esq., and assist them in creating a false, misleading and completely untrue situation regarding the ownership of the $12,200 in the Escrow Account, in that they did condone Dr. Spence falsely asserting ownership to the whole $12,200 and did furnish the First National Bank of Arlington with written authority to falsely state that Dr. Spence was the owner of the whole $12,200.

This Court has heretofore found in the proceeding arising under the Rule to Show Cause that the statement dated April 22, 1964, signed by Drs. Dolan, Schwartz and Hazel said one thing, and one thing only, to the First National Bank of Arlington: We, Drs. Dolan, Schwartz and Hazel, together with Dr. Spence, are the owners of the Escrow; that we release any and all right that we may have to that fund insofar as it refers to the First National Bank of Arlington; and we consent that you (the First National Bank of Arlington) file a <u>false</u> answer in the case of Spence vs. Balogh stating that the funds so held belong to Dr. Spence; and that it was not an assignment of the rights of Drs. Dolan, Schwartz and Hazel in the Escrow Account to Dr. Spence.

Throughout the proceedings in this Court arising under the Rule to Show Cause, and the proceedings in Civil Action 2997-63 and Attachment Action 96-86, where the ownership of the Escrow Account was in issue, directly or indirectly, Dr. Spence, while under oath, repeatedly testified that he was the only one entitled to the $12,200, and his attorney

repeatedly made the same representations in the pleadings that he filed on behalf of Dr. Spence.

This testimony was repeated, and this allegation was repeated, even in the face of testimony by the president of the First National Bank of Arlington that the Escrow Account had been created by the doctors and that the $12,200 remaining in the account belonged to the doctors, and that Dr. Spence had contributed only $4,000 to the fund.

By such actions, and his persistence in continuing to press for relief on these fabricated facts, and by his failure to take appropriate action to protect the interests of all four of his clients at the appropriate times, counsel has led his clients into a no-man's land from which there is no return. Worst of all, he has created a situation whereby Dr. Spence has perjured himself by now coming in and taking oath that his interest in the Escrow Account amounts to only $4,000 when in previous hearings and while under oath, he has time after time asserted that he is entitled to the full amount of $12,200.

The situation which Mr. Doherty has created could, under the best of conditions be resolved at least partially in favor of his clients only on equitable principles. But those who seek relief in equity must come in with clean hands. The absence of clean hands in this proceeding is too obvious to ignore.

To be sure, under normal conditions, the general creditors have no claim to this money if it is a true escrow. However, the conduct of the doctors, the nature of the legal actions that have been filed and the testimony presented, have removed a basis on which equitable relief can be extended to these claimants.

Likewise, the general creditors should not be burdened with the costs, fees and expenses accrued to the Trustee in Bankruptcy because of the litigation pursued by, and/or with the consent of, these claimants.

A proper and honest presentation of their claims at the inception of these proceedings would have avoided all of the problems heretofore presented. These doctors, personally or through their attorney, had timely notice of this bankruptcy proceeding and the date set for the first meeting of creditors. They elected not to present their claims as provided by the appropriate provisions of the Bankruptcy Act, within the time limits therein set forth, or as provided by Local Rule 68. Instead, they made their election to proceed in a manner that could not be supported factually or legally. Having made that election they are bound by it, and no good cause has been shoen to justify granting leave to file a reclamation petition at this late date.

The motions of Drs. Dolan, Spence, Schwartz and Hazel for leave to file petitions to reclaim property from the Trustee are denied.

The Trustee will prepare an appropriate order and present the same at 10:00 o'clock a.m. on the 20th day of June, 1968.

Dated: June 14, 1968

John A. Brenahan
REFEREE IN BANKRUPTCY

[Caption Omitted in Printing]

PETITION FOR REHEARING ON PETITION FOR REVIEW

Your petitioners, Drs. Raymond Schwartz, William D. Dolan and William T. Spence, respectfully petitions the Court for a rehearing on their petition for review and with leave to reargue their petition for review and submit the following in support of their petition for a rehearing:

The memorandum of the Referee in Bankruptcy, under date of February 20, 1968, discloses that on March 30, 1964, Spence filed an attachment in the Circuit Court of Arlington County attaching the sum of $12,200.00 in the hands of the First National Bank of Arlington (Page 12). The bankruptcy petition was filed August 19, 1964. The Referee in his order of February 20, 1968, denied the claim of Edward J. McGrath, Trustee in Bankruptcy, to the outright and unencumbered ownership of the said escrow balance of $12,200.00 in the Balogh & Company, Inc. escrow account, and further gave to your petitioners the right to initiate proceedings to establish their claim to this fund. The record does disclose that the fund was never held as an asset of Balogh & Company and that it was in the escrow account only for the purpose of purchasing stock for your petitioners.

Your petitioners filed their petition for a refund of the money which was not permitted to be filed and requiring your petitioners to file a motion for leave to file a petition for reclamation even though the order of February 20, 1968, gave to your petitioners the right to file their claim and the motion for leave to file their claim was dismissed.

Section 107 of Title 11, U. S. C. A., among other things, contains the following:

> "Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this title: Provided, however, That if such person is not finally adjudged a bankrupt in any proceeding under this title and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided."

Decisions of the United States District Courts and of the United States Courts of Appeals have construed this section of the Bankruptcy Code to exclude cases of attachments which have been made more than four months prior to the filing of the petition in bankruptcy as being without the jurisdiction of the Bankruptcy Court.

In the case of Griffin, et al v. Lenhart, et al, 266 F. 671, a decision of the Fourth Circuit Court of Appeals, this section of the Bankruptcy Code was before the Court for decision and the opinion of the Court, at page 674, contained the following:

> "We shall not undertake the hopeless task of reconciling the apparently conflicting reasoning of the courts in other important cases bearing on the subject. We venture to think, however, that there is a distinction under which the cases relied on by appellees will, in actual adjudication, turn out to be entirely consistent with each other, and with all the cases above cited. It is this: Where a state court has obtained complete

> jurisdiction by hostile proceedings, which creditors have instituted for the enforcement of their demands, and in which creditors have acquired liens on property more than four months before the filing of the petition in bankruptcy, the disposition of the property for payment of the liens should be left to the state court, without interference from the court of bankruptcy. In such case the trustee in bankruptcy is interested only in the surplus proceeds of sale, and in having the suit in the state court pressed with due diligence."

The United States District Court, in the case of Consolidated Container Carriers, Inc. 254 F. Supp. 605, a bankruptcy proceeding, held that where a creditor, more than four months prior to the filing of the bankruptcy petition, had commenced action against debtors in state court by means of writ of foreign attachment against such asset that the bankruptcy court did not have summary judgment over this matter.

Note 340 under Section 107 has the following:

> "If a state court of competent jurisdiction has taken cognizance of an action to establish or enforce a lien on property of a debtor, and the action is pending at the time of his adjudication in bankruptcy, but the lien is not dissolved thereby, because it attached more than four months previously, the jurisdiction of the state court is not divested by the bankruptcy proceedings, and the federal court has no rightful authority to enjoin the creditor from the further prosecution of his action. Metcalf v. Barker, N. Y. 1902, 23 S. Ct. 67, 187 U. S. 165, 47 L. Ed. 122. * * *"

It is contended that the Bankruptcy Court in this matter had no jurisdiction of any kind over the $12,200.00 in the First National Bank of Arlington which was under attachmen. in the Circuit Court of Arlington County, Virginia, and which was carried on the books of the bankrupt at the time that

it went into bankruptcy, more than four months after the attachment was had. It is further contended that the Bankruptcy Court had no authority or jurisdiction to enter a summary order that it did have jurisdiction of this matter and that the question of the jurisdiction of the Referee in Bankruptcy may be raised at any time. Alexander v. Westgate, 111 F. (2d) 769.

In the case of Duvall v. Southern Municipal Corporation, 63 Atl. (2d) 336, the Court, at page 338, made the following statement:

> "Furthermore, it is fundamental that jurisdiction over the subject matter of a case may never be conferred by consent and may even be questioned for the first time on appeal."

The Court also referred to United States v. Corrick, 298 U. S. 435.

The same Court, in the case of Henderson v. E Street Theatre Corporation, 63 Atl. (2d) 649, at page 650, made the following statement:

> "Appeal was taken from this order of dismissal, but the jurisdictional issue was not assigned as error or otherwise questioned. It is well settled, however, that jurisdiction of the subject matter of a case may neither be assumed by a court nor conferred upon it by consent or silence of the parties. It may be raised at any stage of the proceedings and hence this court raised the question sua sponte at oral argument."

It is respectfully submitted that your petitioners, under the circumstances set out above, should be granted a rehearing on their petition for a review and permitted to argue the foregoing points covering the jurisdiction of the Referee to pass upon the ownership of funds not a part of the estate of the bankrupt.

In the face of the statements of the Referee covering this fund, to permit the fund to remain in the hands of the Trustee in Bankruptcy would be judicial larceny.

DOHERTY, ATTRIDGE & DOHERTY

By _____

Cornelius H. Doherty
1010 Vermont Avenue, N. W.
Washington, D. C. 20005
NAtional 8-6257
Attorneys for Petitioners

[Certificate of Service Omitted in Printing]

Counsel has been informed that the original Petition which was filed in this case has been misplaced and it was suggested that a copy of the original petition be prepared and filed.

_____
Cornelius H. Doherty

FILED

NOV 20 1968

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RESPONSE TO PETITION FOR REHEARING ON PETITION FOR REVIEW
(Drs. William T. Spence, Raymond Schwartz and William D. Dolan)

TO THE HONORABLE HOWARD F. CORCORAN, JUDGE:

Edward J. McGrath, duly appointed and qualified Trustee in Bankruptcy of the above-captioned bankrupt, for his response to the Petition for Rehearing on Petition for Review filed by Drs. William T. Spence, Raymond Schwartz and William D. Dolan, respectfully represents:

1. The arguments made in the Petition for Rehearing on Petition for Review were made by counsel for petitioners in his oral argument to this court at the

time of hearing on the Petition for Review on October 29 and duly considered by this court in reaching its decision affirming the Referee in Bankruptcy and dismissing the Petition for Review.

2. The argument of law relating to the summary jurisdiction of the Bankruptcy Court in avoiding liens through legal proceedings obtained more than four months prior to the filing of the petition in bankruptcy, as provided under Section 67a of the Bankruptcy Act (11 U.S.C. 107a), begs the issue since the summary jurisdiction of the Bankruptcy Court was established by order of the Bankruptcy Court entered October 27, 1964, after due notice and hearing on Trustee's Motion to Enjoin (1) William T. Spence, (a) Plaintiff, Civil Action 2997-63, United States District Court for the District of Columbia, and (b) Plaintiff, Attachment Action No. 96-86, Circuit Court of Arlington County, Virginia, and to enjoin (2) First National Bank of Arlington, and (3) For Order to Show Cause why the Escrow Deposit in said Bank should not be Turned Over to the Trustee, wherein, inter alia, in said order, the Referee in Bankruptcy made the following findings of fact and conclusions of law relating to the Bankruptcy Court's summary jurisdiction:

> "(1) As no timely objection has been made or filed by any respondent, this court should assume summary jurisdiction of the issues between the several respondents and the Trustee in Bankruptcy as framed in Civil Action No. 2997-63 in the United States District Court for the District of Columbia in which Balogh & Company is named defendant, and attachment action No. 9686 in the Circuit Court for Arlington County, Virginia, in which William T. Spence is plaintiff and the bankrupt corporation, Stephen E. Balogh, and the First National Bank of Arlington are named defendants, and all defenses and counterclaims and set-offs therein asserted;"
>
> * * *
>
> "ORDERED that all further proceedings and issues between the Trustee in Bankruptcy, William T. Spence, the First National Bank of Arlington, and Stephen E. Balogh, relating to issues raised in complaints, defenses, and counterclaims, in Civil Action 2997-63, United States District Court for the District of Columbia, and attachment action No. 9686, Circuit Court for Arlington County, Virginia, and claims to the sum of $12,200.00 on deposit in the First National Bank of Arlington, be and the same hereby are decreed to be subject to the summary jurisdiction of this court; and it is further

> "ORDERED that no injunction will issue restraining further action in said court actions or in reference to the disposition of the fund in the First National Bank of Arlington in the escrow account of Balogh & Company upon the assurances of counsel for parties in interest that no further action will be undertaken without prior leave or authority of this court; and it is further
>
> "ORDERED that subject to the jurisdiction and until further order of this court the sum of $12,200.00 now on deposit in the First National Bank of Arlington in the name of Balogh & Company Escrow Account shall remain therein . . . "

The petitioners, all of whom were represented at that time by Cornelius H. Doherty, did not seek a review nor take an appeal from said order and the same became final and not subject to collateral attack.

3. The provisions of Section 2a(7) of the Bankruptcy Act (11 U.S.C. 11a(7)) govern the summary jurisdiction of the Bankruptcy Court to determine controversies in relation to property. In said section, it is provided in pertinent part as follows:

> " . . . and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

4. No objection was made to this court's summary jurisdiction, timely or otherwise, by the petitioners or any of them until the argument on review of petitioners' counsel. Absent timely objection to summary jurisdiction as provided statutorily under Section 2a(7) of the Bankruptcy Act, there is no basis for this court considering the objection to summary jurisdiction untimely made.

5. The order of the court of June 20, 1968, denying motions for leave to file petitions to reclaim property from the Trustee, to which the Petition for Review was addressed, results from the efforts of Drs. Spence, Schwartz and Dolan, petitioners for review, and Dr. John T. Hazel, who did not petition for review, to file Petitions for Reclamation upon the filing of motions for leave to file said petitions. The fund of $12,200.00 to which petitioners have asserted claims was in the actual possession of the Trustee in Bankruptcy, having been turned over pursuant to the order

of the Referee in Bankruptcy of February 8, 1968. Neither a review nor an appeal was sought to said order by petitioners, or any of them, and the said order became final within ten days of its entry pursuant to the provisions of Section 39c of the Bankruptcy Act (11 U.S.C. 67c). The petitioners, have, pursuant to order of February 8, 1968, of the Bankruptcy Court, a court of equity, sought, by filing of Motions for Leave to File Petitions for Reclamation, to participate in the fund in the possession of the Trustee in Bankruptcy held subject to the Bankruptcy Court's summary jurisdiction. By so doing, the petitioners have submitted to the summary jurisdiction of the Bankruptcy Court and cannot undertake to attack or oppose the same.

6. The $12,200.00 fund now in the actual possession of the Trustee was at the time of the filing of the petition in bankruptcy in August 1964 in the constructive possession of the bankrupt in an account in the First National Bank of Arlington held in the name of the bankrupt entitled "Balogh & Company Escrow Account". The Bankruptcy Court, by its order of October 27, 1964, as above quoted in part, provided expressly its summary jurisdiction over the deposit of $12,200.00 in the First National Bank of Arlington (see quotation above, paragraph 2). It is established law that the Bankruptcy Court has exclusive summary jurisdiction of all controversies relating to property in either the actual or constructive possession of the bankrupt on the date of bankruptcy (2 Collier on Bankruptcy, pages 449 through 490, and citations therein).

7. Respondent respectfully states that for the foregoing reasons, all of which were argued by respondent's counsel before this court at the time of hearing on the Petition for Review on October 29, and which this court duly considered in reaching its decision affirming the Referee and dismissing the Petition for Review, the Petition for Rehearing Petition for Review raises no new matters of law or fact and is repetitious of arguments heretofore made and considered by this court, and should be dismissed upon order of this court without hearing.

WHEREFORE, premises considered, it is prayed that this court dismiss the Petition for Rehearing on Petition for Review without hearing.

Edward J. McGrath
Trustee in Bankruptcy

Samuel M. Greenbaum
Attorney for the Trustee
401 Tower Building
Washington, D. C. 20005
347-2626

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

ANSWER TO OBJECTION FOR REHEARING

Your petitioners, Drs. Raymond Schwartz, William D. Dolan and William T. Spence, through their attorney, Cornelius H. Doherty, in answer to the response to petition for rehearing on petition for review filed on behalf of the Trustee in Bankruptcy, in which it refers to the summary jurisdiction taken by the Bankruptcy Court, submit the following:

The Trustee's response is based entirely upon the alleged summary jurisdiction taken by the Referee in Bankruptcy in this case but it fails to disclose the fact that before summary jurisdiction may be taken it is necessary that there be primary jurisdiction.

There is attached to the original of this answer a photostat copy of the entire opinion in the matter of Consolidated Container Carriers, Inc., decided May 27, 1966, in the United States District Court for the Eastern District of Pennsylvania, and reported in 254 F. Supp. 605, which clearly explains the distinction between summary and primary jurisdiction.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

TRUSTEE'S MOTION TO STRIKE ANSWER TO OBJECTION FOR REHEARING FILED ON BEHALF OF DRS. SPENCE, DOLAN AND SCHWARTZ

TO THE HONORABLE HOWARD F. CORCORAN, JUDGE:

Edward J. McGrath, duly appointed and qualified Trustee in Bankruptcy in the above-captioned proceeding, moves this court to strike the Answer to Objection for Rehearing filed herein by Drs. Raymond Schwartz, William D. Dolan and William T. Spence, through their attorney, Cornelius H. Doherty, and in support thereof respectfully represents:

1. The said pleading purports to be a pleading responding to Trustee's Response to Petition for Rehearing on Petition for Review which was filed by said doctors by their counsel undertaking to request this court to review its Order Affirming Referee in Bankruptcy and Dismissing Petition for Review. The said pleading, though entitled "Answer", is not an answer nor response to any pleading and is entirely inappropriate and improper under the Federal Rules of Civil Procedure governing pleadings in this court as well as in the Bankruptcy Court under the provisions of General Order 37.

2. The case relied upon by petitioners in the purported "Answer", of Consolidated Container Carriers, Inc., 254 F. Supp. 605 (D.C.E.D. Pa. 1966), sets forth correctly the law applicable to the facts of said case. However, the facts in the issue before this court are entirely distinguishable. The petitioners lose sight of the issue upon which they petition for a review of the order of the Referee in Bankruptcy entered June 20, 1968, denying motions for leave to file petitions to reclaim property from Trustee. The sole issue on review is the correctness of the Referee's Findings of Fact and the application of the law thereto upon which he determined that the petitioners should be denied leave to file petitions for reclamation. The law the Referee applies to the facts before him is appropriately the application of equitable principles. The Bankruptcy Court being a court of equity, in

denying applicants leave to file their petitions for reclamation on the doctrine of "unclean hands", found that the conduct of petitioners and their counsel amounted to an attempted fraud on the Bankruptcy Court. The Referee's order, subject of review, in no way relates to a determination of the merits of the sought to be filed petitions for reclamation. Counsel for petitioners apparently chooses to overlook the issue before this court on review and undertakes to argue facts and law not before the court.

3. The entire thrust of the purported "Answer" of petitioners, relying entirely on the opinion in the Consolidated Container Carriers, Inc. case, is directed to the matter of alleged lack of summary jurisdiction of the Bankruptcy Court. In response to this argument, which is not properly before this court on review, the following is submitted:

(a) The order of the Referee of October 27, 1964, firmly established by said order the summary jurisdiction of the Bankruptcy Court, and no review or appeal was ever taken therefrom. The said order became final ten (10) days following its entry under the provisions of Section 39c of the Bankruptcy Act (11 U.S.C. 67c);

(b) No objection to jurisdiction was made by Dr. Spence, or the First National Bank of Arlington, respondents in the Trustee's motion upon which said order was entered after due hearing;

(c) Under the provisions of Section 2a(7) of the Bankruptcy Act (11 U.S.C. 11a(7)), the said parties who do not timely object are deemed by statute to consent to summary jurisdiction even if, had they timely objected, the court may have lacked summary jurisdiction;

(d) Dr. Spence, in his answer filed October 15, 1964, to Trustee's motion to enjoin, sought affirmative relief by requesting an order of the Bankruptcy Court directing the Trustee to release the escrow funds to him. Spence, by seeking affirmative relief in the court of equity, the Bankruptcy Court, is deemed to have consented to its jurisdiction by

seeking its relief. However, even absent the affirmative relief sought, Dr. Spence, having failed timely to object to summary jurisdiction under the provisions of Section 2a(7) of the Bankruptcy Act, is deemed to have consented.

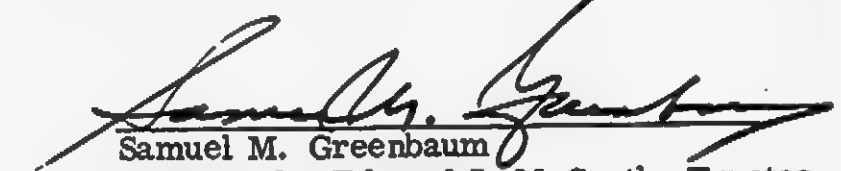
4. The issue before the Bankruptcy Court upon which the Petition for Review was sought was not the summary jurisdiction of the Bankruptcy Court to determine the validity of a judicial lien on bankrupt's property attaching more than four (4) months before the bankruptcy petition, as was the issue in the Consolidated Container Carriers, Inc. case. However, the law relating to the extent of the Bankruptcy Court's summary jurisdiction under such facts as were presented in said case is correctly stated. In applicable part, the court there correctly states on page 608 (bottom, second column) that unless the bank in which the account was maintained consents to summary jurisdiction of the Bankruptcy Court, the court lacks such jurisdiction and the Trustee must bring a plenary suit in a court of competent jurisdiction to recover the funds on deposit to which he believes the bankrupt is entitled. It should be pointed out in the Balogh & Company, Inc. proceeding that the bank did not oppose the summary jurisdiction of the Bankruptcy Court, and by virtue of Section 2a(7) of the Bankruptcy Act (11 U.S.C. 11a(7)) is deemed to have consented thereto. The bank and Dr. Spence, having voluntarily submitted themselves to the jurisdiction of the Bankruptcy Court by responding to its order to show cause by hearing held without objection to its summary jurisdiction, are deemed to have consented to its summary jurisdiction irrespective of their rights to oppose summary jurisdiction had they been timely asserted.

THEREFORE, the law relied upon by petitioners as correctly set forth in the Consolidated Container Carriers, Inc. case is distinguishable from law applicable to the facts in this matter since Section 2a(7) of the Bankruptcy Act applies herein whereas it was not applicable to the facts in the Consolidated case. Furthermore, and of more significance, the fact that the time for objecting to the court's summary jurisdiction was within ten (10) days from the entry of the Referee's order of October 27, 1964,

finding summary jurisdiction, and said order having become final is not now reviewable and is not properly part of the issue on review of the Referee's order of June 20, 1968, denying petitions for leave to file petitions for reclamation.

The arguments made by petitioners' counsel in his Petition for Rehearing on Petition for Review, and the Answer to Objections for Rehearing, are all a rehash of arguments made to this court at the time of the hearing on the Petition for Review on October 29, 1968. All of the arguments addressed to objection to jurisdiction completely beg the issue before the court on review. This court should, therefore, strike the Answer to Objection for Rehearing and deny, without hearing, the petition for rehearing filed.

Respectfully submitted,



Samuel M. Greenbaum
Attorney for Edward J. McGrath, Trustee
401 Tower Building
Washington, D. C. 20005
347-2626

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given this 10th day of January, 1969, that petitioners, Drs. William T. Spence, William D. Dolan and Raymond Schwartz, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the judgment represented by an order dated December 30, 1968, denying petition for rehearing and granting motion to strike answer to objection for rehearing filed on behalf of Drs. William T. Spence, William D. Dolan and Raymond Schwartz, in accordance with its order dated December 11, 1968.

DOHERTY, ATTRIDGE & DOHERTY

1002—Official Form.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
67 EXCHANGE PLACE, AT BROADWAY, NEW YORK

SCHEDULE A.—STATEMENT OF ALL DEBTS OF DEBTOR (Continued)

Schedule A-2.

Creditors holding securities

(N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Act of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.)

Reference to letter or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated.)	Description of securities	When and where debts were contracted, and nature and consideration thereof.	Whether claim is contingent, unliquidated or disputed.	Value of securities.		Amount due claimed.	
						$		$	
C 201	S. David Rubenstein Trustee in Bankruptcy #71-63 Teletray Electronic Systems, Inc. (formerly Audio Dynamics Corp.), Suite 631, Tower Building, Washington 5, D.C.					Unknown		4,222	9
			Balance due on Rental Purchase agreement executed 5 April 1960, re office furniture and equipment of which $345 is due American National Bank, Silver Spring, Maryland. Items of furniture and equipment subject to the agreement not clearly identifiable.						
Legal	William T. Spence, 3715 Idaho Ave., N.W., Washington, D.C. vs. Balogh & Co. U.S. District Court D.C. Civil Action 2997-63 filed 16 December 1963. Complaint re mandatory injunction and damages - with 6% interest from 14 October 1963 plus costs							12,200	0
			William T. Spence vs. Balogh & Co. 30 March 1964 Circuit Court of Arlington County, Virginia #96-86. Attachment on funds in First National Bank of Arlington, Va. with 6% interest from 7 October 1963 plus costs and attorney fees.	DISPUTED		12,200	00		
ERA Haupt	Ira Haupt & Co., 111 Broadway, New York 6, N.Y. Due on Balo Co. omnibus margin a/c 05-308549 - as of 6/15/64					$1,433.76			
C 204	Accrued Interest Payable (estimated 7/31/64)			160.71				1,594	4
			Securities undelivered by Haupt. See Schedule B-3 Attachment Page B-3a(1) "Due from customers on Balo Co. Omnibus Margin Account" for list - quote 7/31/64			5,917	50		
					Total	18,117	50	18,017	4

BALOGH & COMPANY, INC.
By Ruby Smith Stahl Petitioner
Assistant Secretary

JULIUS BLUMBERG, INC. LAW BLANK PUBLISHERS
80 EXCHANGE PLACE, AT BROADWAY, NEW YORK

SCHEDULE B-3 (Continued)

Choses in action.

* * *

c — Unliquidated claims of every nature, with their estimated value.

Legal.

(See Schedule A-2. William T. Spence vs. Balogh & Co.)
Counterclaim filed 8 January 1964 in U.S. District Court, D.C. - Re: Civil Action #2997-63. DISPUTED

Loss Underwriting Commission	$ 9,330.00	
Reimbursement expenses including attorney fees, etc., relating to the Northern Virginia Doctor's Hospital Underwriting	25,000.00	
Loss and injury to corporate name, good will and business	250,000.00	284,330

Legal

Claims against certain directors and former directors, Stephen E. Balogh, Bertrand A. Handwork, Claude E. Hawley, Helen Dwight Reid.

The minutes of a meeting of the Board of Directors of the Company held May 9, 1962, show attendance by the foregoing directors and action without dissent authorizing
(Continued on Attachment Page B-3c, made a part hereof.)

d — Deposits of money in banking institutions and elsewhere.

A/C 101	American Security & Trust Co., 15th & Pennsylvania Ave., N.W., Washington, D.C.	
	Regular Checking Account #810-36-568 (6 August 1964)	16,000
A/C 104	National Savings & Trust Co., 15th & New York Ave., N.W., Washington, D.C.	
	Checking Account #211-884 (31 July 1964)	26
A/C 115	First National Bank of Arlington, 801 North Glebe Road, Arlington, Virginia	
	Special Checking Account #001-88-523 (31 July 1964) Subject to attachment, See Schedule A-2, Claim of Spence.	12,200
	Total	315,235

BALOGH & COMPANY, INC.

By Ruby Smith Stahl, Petitioner
Assistant Secretary

BALOGH & COMPANY, INC.

SCHEDULE B-3 ATTACHMENT PAGE B-3c

Unliquidated Claims (Continued)

a loan of $15,450 to Stephen E. Balogh, then President and holder of substantially all the stock of the Company, and also payment to Mr. Balogh of up to $100,000 to permit him to repay loans which he had obtained for the purpose of contributing donated surplus to the Company. The loan was made and remains unpaid. See Schedule B-2 Attachment Page B-2b(3). Withdrawals of $96,550 were also made. Attorneys for creditors have suggested director liability under D.C. Code Section 29-918. Liability is denied by the individuals.

BALOGH & COMPANY, INC.

By Ruby Smith Stahl Petitioner
Assistant Secretary

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,755

IN THE MATTER OF BALOGH & COMPANY, INC.,

Bankrupt,

DRS. WILLIAM T. SPENCE, WILLIAM D. DOLAN,
RAYMOND SCHWARTZ,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N.W.
Washington, D.C. 20005
Attorney for Appellants

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding Bankruptcy Court

In the Matter of:	)	
	)	
BALCOH & COMPANY, INC.	)	In Bankruptcy
a corporation	)	
	)	No. 69-64
Bankrupt	)	

BANKRUPTCY DOCKET

DATE	PROCEEDINGS
[illegible]	
Aug. 1,	Petitions (5) Schedules (5) filed
Aug. 1,	Statement of Affairs (5)
1968	
May 27	Memorandum of Ruby Smith Stahl in opposition to Trustees counterclaim to claim of Ruby Smith Stahl: c/s 5/27/68: Appendix A. filed
May 27	Amendment to stipulation and agreed statement of facts on Trustee's counterclaim to claim of Ruby Smith Stahl: Exhibit "F" filed
July 3	Certificate of Referee on Petition to review filed (Attachments 1 thru 21)
Aug. 1,	Supplemental Certificate of Referee on petition to review; Supplements (22 thru 39) filed
Aug. 8,	Memorandum of Schwartz, Dolan & Spence in support of petition for Review; Statement of facts: c/m 8-6-68. M.C. filed
Oct. 29,	Petition for review argued and taken under advisement. (Ref: Gerald Nevitt) filed
Nov. 15	Petition of Drs. Raymond Schwartz, William D. Dolan and William T. Spence for rehearing on petition for review; c/m 11/14/68. M.C. filed
Nov. 20	Response of Trustee to petition for rehearing on petition for review; c/m 11/15/68. filed
Nov. 20	Answer of Drs. Raymond Schwartz, William D. Dolan & William T. Spence to objection for rehearing. Exhibit. filed
Nov. 21	Order affirming referee in Bankruptcy and dismissing petition for review. (N) CORCORAN, J.
Nov. 27,	Motion of Edward J. McGrath, Trustee, to strike answer to objection for rehearing; c/m 11/22/68. filed

Dec. 11, Order denying petition for rehearing and granting motion to strike answer to objection for rehearing filed on behalf of Drs. Spence, Dolan and Schwartz. (n) CORCORAN, J.

1969
Jan. 10, Notice of Appeal of Drs. William T. Spence, William D. Dolan and Raymond Schwartz from order of December 11, 1968; copy to Samuel M. Greenbaum, 401 Tower Bldg. Deposit by Doherty $5.00. filed

Jan. 21, Motion of Trustee to dismiss appeal for failure to post bond; P & A's; c/m 1/17/69; M.C. filed

Jan. 30, Answer to motion to dismiss appeal; c/m 1/30/69. filed

Feb. 4, Memorandum of Trustee in opposition to answer to motion to dismiss appeal; P & A's; c/s 2-4-69. filed

Feb. 12, Cost Bond on Appeal by petitioners in sum of $250.00 with Hartford Accident & Indemnity Co. approved and filed McGuire, J.

Feb. 12, Order denying motion to dismiss appeal. (N) (371/n) McGuire, J.

Feb. 13, Motion to stay request for instructions; c/s 2/12/69;M.C. filed

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[Caption Omitted in Printing]

P E T I T I O N

To the Honorable
Judges of the United States District
Court for the District of Columbia:

THE PETITION of Balogh & Company, Inc., a corporation engaged in the business of a broker and dealer in securities, the name of which corporation prior to May, 1959 was The Matthew Corporation...

RESPECTFULLY REPRESENTS:

1. Your petitioner is a business corporation organized and existing under the laws of the District of Columbia and has had its principal office and its principal place of business at Woodward Building, 733 15th Street, N.W.,

Washington, D.C., within the above judicial district, for the six months immediately preceding the filing of this petition.

2. Your petitioner owes debts and is willing to surrender all its property for the benefit of its creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to Bankruptcy; and its Board of Directors has duly authorized such acts on its part and the statements herein made in its behalf as evidenced by a certified copy of resolution hereto annexed and marked Exhibit 1.

3. The schedule hereto annexed, marked Schedule A, and verified by the oath of the undersigned officer of your petitioner, contains a full and true statement of all its debts, and so far as it is possible to ascertain, the names and places of residence of its creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by the oath of the undersigned officer of your petitioner, contains an accurate inventory of all its property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

WHEREFORE, your petitioner prays that it may be adjudged by the court to be a bankrupt within the purview of said Act.

[Subscription Omitted in Printing]

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

WILLIAM T. SPENCE
3715 Idaho Avenue, N. W.
Washington, D. C.

Petitioner

vs.

BALOGH & COMPANY, INC.,
A CORPORATION
Woodward Building
Washington, D. C.

STEPHEN E. BALOGH
1026 16th Street, N. W.
Washington, D. C.

Defendants

and

FIRST NATIONAL BANK OF
ARLINGTON, A CORPORATION
801 N. Glebe Road, Arlington, Va.

Co-Defendant

No. 9686

PETITION FOR ATTACHMENT

TO THE JUDGE OF THE SAID COURT:

Your petitioner, William T. Spence, respectfully represents that the said principal defendants, Balogh & Company, Inc., a Corporation, and Stephen E. Balogh, are justly and truly indebted to the petitioner, William T. Spence, in the sum of Twelve Thousand Two Hundred ($12,200.00) Dollars, with interest thereon at six (6%) per cent per annum from October 7, 1963, besides damages for its detention, costs and attorney's fees, by reason of their

failure, and each of them, to pay over to the petitioner the sum of Twelve Thousand Two Hundred ($12,200.00) Dollars held in the name of "Balogh & Company, escrow account" in the First National Bank of Arlington, Virginia, and being the property of petitioner; that the defendant, Balogh & Company, is a foreign corporation with its main office in the Woodward Building, Washington, D. C., and the defendant, Stephen E. Balogh is the President and majority stockholder of the defendant, Balogh & Company, Inc., and is a non-resident of the State of Virginia, residing at 1026 16th Street, N. W., Washington, D. C.; that the principal defendant, Balogh & Company, Inc., has issued its check on the escrow account to pay a private obligation of the principal defendant, Stephen E. Balogh, thereby converting petitioner's property so as to hinder, delay and defraud the petitioner of the monies justly due him, and that he is entitled to the benefit of a lien, legal or equitable, on property, real or personal, within the County of Arlington, Virginia.

WHEREFORE, your petitioner asks for an attachment against the estate, real and personal, of said principal defendants, Balogh & Company, Inc., a Corporation, and Stephen E. Balogh, in the State of Virginia, and more particularly against the property and monies of the said defendants now in the possession of or under the control of the First National Bank of Arlington, a Corporation, 801 North Glebe Road, Arlington, Virginia, who your petitioner prays may be made co-defendant to these proceedings and required to answer and disclose what property belonging to the principal defendants is now in its possession or under its control; that the said property or so much thereof as may be necessary to satisfy the claim of your petitioner be applied as satis-

faction thereof; that proper process may issue; and that an order of publication may be granted and that your petitioner may have such other, further and general relief as the nature of the case may require.

And your petitioner will ever pray, etc.

[Subscription Omitted in Printing]

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding Bankruptcy Court

In the Matter of:	)	
	)	In Bankruptcy
BALOGH & COMPANY, INC.	)	
a corporation	)	No. 69-64
	)	
Bankrupt	)	

[REFEREE'S MEMORANDUM]

[Feb. 20, 1968]

* * *

March 30, 1964. On this date a notice of Motion for Judgment was filed in Attachment Action No. 96-86 in the Circuit Court for Arlington County, Virginia, and thereafter the funds in the Bank in the name of "Balogh & Company Escrow Account" in the sum of $12,200 were attached. This suit was filed by Spence against the Company, Balogh and the Bank.

This action is a part of the proceedings now before this Court.

* * *

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

MOTION TO ENJOIN (1) WILLIAM T. SPENCE, (a) PLAINTIFF, CIVIL ACTION 2997-63, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, and (b) PLAINTIFF, ATTACHMENT ACTION No. 96-86, CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA, AND TO ENJOIN (2) FIRST NATIONAL BANK OF ARLINGTON
and
(3) FOR ORDER TO SHOW CAUSE WHY THE ESCROW DEPOSIT IN SAID BANK SHOULD NOT BE TURNED OVER TO THE TRUSTEE

TO THE HONORABLE JOHN A. BRESNAHAN, Referee in Bankruptcy:

Edward J. McGrath, duly appointed and qualified Trustee in Bankruptcy of the above-captioned estate, respectfully represents:

1. He was appointed by this court as Trustee on the 10th day of September, 1964, and thereafter duly qualified by giving bond in the directed amount.

2. There is scheduled, on Schedule A-3 filed in this proceeding, a claim of William T. Spence, 3715 Idaho Avenue, N. W., Washington, D. C., upon which two suits have been filed, viz:

(a) United States District Court for the District of Columbia, Civil Action No. 2997-63, filed December 16, 1963. Said suit is a complaint seeking recovery of a commission retained by the bankrupt corporation in transactions involving said William T. Spence, for a mandatory injunction and for damages, with interest at 6% from October 14, 1963, plus costs. Counterclaim on behalf of the bankrupt corporation was filed in said action on, to-wit, January 8, 1964, in the sum of $284,330.00. (For details see Schedule B-3(c) of the bankrupt's schedules filed herein.)

(b) A notice of Motion for Judgment initiated in the Circuit Court for Arlington County, Virginia, in Attachment Action No. 96-86, was filed on March 30, 1964. Thereafter, upon an attachment issued to the Sheriff of Arlington County,

> funds in the First National Bank of Arlington, in an escrow account entitled "Balogh & Company Escrow Account", in the sum of $12,200.00 were attached. Named in the said suit as co-defendants, in addition to the bankrupt corporation, were Stephen E. Balogh, individually, and the First National Bank of Arlington.

Petitioner, as of this date, has not had the opportunity to review all pleadings in the foregoing court actions; however, due to the emergent and expedient matters confronting him in regard thereto, seeks an injunction to issue by this court directing William T. Spence, plaintiff in both actions, his agents, attorneys and representatives, and others, acting directly in his behalf, from further action or proceeding in connection with either of said actions, or from commencing any other action other than in this proceeding in regard to the claim or claims asserted against the defendants in said actions.

3. There is presently pending a hearing set for September 29, 1964, before the Circuit Court, Arlington County, Virginia, upon the Motion to Quash the attachment effected by the Sheriff upon the plaintiff's Motion for Judgment.

4. Petitioner is informed that the First National Bank of Arlington has filed an answer acknowledging a deposit in the name of "Balogh & Company Escrow Account" in said bank in a sum sufficient to satisfy the attachment. Further, said bank asserts a right of set-off to the extent of $9,000.00 for alleged obligations owing by Balogh & Company, Inc. to said bank providing said funds are determined to be the funds of Balogh & Company.

5. Petitioner states that the pending litigation instituted by William T. Spence, with the exception of the funds under attachment, at best, if said

plaintiff succeeds in his actions, would constitute a claim or claims assertable by Proof of Claim in the bankruptcy proceeding.

6. Petitioner asserts that the multiplicity of actions pending on which the bankrupt corporation has already in the United States District Court for the District of Columbia asserted a substantial counterclaim, could be expediently and summarily adjudicated by this court pursuant to a properly filed Proof of Claim, and that to require petitioner to undertake defense of said plenary actions and the assertion of bankrupt's counterclaim in one of said actions, and the pursuit of the Motion to Quash the attachment in the other of said actions, will unduly delay and interfere with the administration of the estate and require the incurrence of substantially greater expense in said plenary litigation than would be required in a summary proceeding before this court.

7. The account in the First National Bank of Arlington, designated an escrow account, is an account, the ownership of which is in the bankrupt corporation to which petitioner, as Trustee, succeeds in interest and title, and the beneficiaries thereof are customers and creditors of the bankrupt with claims scheduled in this proceeding. The proper administration of this proceeding requires that said fund be turned over to petitioner as Trustee,and those asserting claims thereagainst be required to initiate by appropriate pleading in this cause, action in support of claims to said fund. Petitioner should not be required to undertake the expense of plenary litigation interfering with the orderly administration of this estate and entailing substantial expense to the detriment of creditors. All assets and property belonging

to the bankrupt as of the date of the filing of the petition in bankruptcy are in custodia legis, and any proceedings affecting said property or assets should be enjoined pursuant to this court's power as provided under Section 2a(15) of the Bankruptcy Act.

WHEREFORE, premises considered, it is prayed:

(1) That this court immediately issue an injunction ex parte restraining William T. Spence, his agents, attorneys and representatives from pursuing further action in Civil Action No. 2997-63 in the United States District Court for the District of Columbia, or in attachment action No. 96-86, in the Circuit Court for Arlington County, Virginia, or from commencing any further or other action, other than in the above-captioned bankruptcy proceeding, relating to or in respect to claim or claims subject of the above-numbered plenary actions.

(2) That this court immediately issue an injunction ex parte restraining the First National Bank of Arlington, its agents, attorneys and representatives, from further proceedings in connection with the action pending in the Circuit Court for Arlington County, Virginia, attachment proceeding No. 96-86, and from setting off or attempting to set off against any asset, credit, or property of the bankrupt in said bank any claim arising upon any alleged obligation to said bankrupt in the sum of $9,000.00, or in any other sum whatsoever.

(3) That an Order to Show Cause issue directing William T. Spence, First National Bank of Arlington, and Stephen E. Balogh to show cause why any deposit,fund, credit, or account, or property of the bankrupt, or to which

the bankrupt is entitled, in the First National Bank of Arlington, Arlington, Virginia, should not be turned over to the Trustee in Bankruptcy, and why any claim or claims to said property or assets by any party asserting claims thereto should not be asserted in this proceeding.

And for such other and further relief as this Honorable Court may deem just and proper.

[Subscription Omitted in Printing]

POINTS and AUTHORITIES IN SUPPORT OF THE FOREGOING MOTION TO ENJOIN (1) WILLIAM T. SPENCE, (a) PLAINTIFF, CIVIL ACTION 2997-63, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, and (b) PLAINTIFF, ATTACHMENT ACTION No. 96-86, CIRCUIT COURT FOR ARLINGTON COUNTY, VIRGINIA, AND TO ENJOIN (2) FIRST NATIONAL BANK OF ARLINGTON, and (3) FOR ORDER TO SHOW CAUSE WHY THE ESCROW DEPOSIT IN SAID BANK SHOULD NOT BE TURNED OVER TO THE TRUSTEE

In support of the foregoing Motion, petitioner respectfully invites this court's attention to the following points and authorities:

1. Section 2a(15) of the Bankruptcy Act (11 USC 11a(15))

2. Volume 1, Collier on Bankruptcy, 14th Edition, pages 300 through 343, paragraphs 2.62 through 2.66.

3. Isaacs vs. Hobbs Tie & Timber Co., 282 US 734, 51 SCt 270, 75 LEd 645.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

ORDER

1. Enjoining William T. Spence, (a) Plaintiff in Civil Action 2997-63, United States District Court for the District of Columbia, and (b) Plaintiff in Attachment Action No. 96-86, Circuit Court of Arlington County, Virginia, and

2. Enjoining First National Bank of Arlington, and

3. Order to Show Cause why the Escrow Deposit in the First National Bank of Arlington should not be Turned over to the Trustee

---

At WASHINGTON, D. C., this 11 day of September, 1964.

Upon consideration of the Trustee's Motion to Enjoin (1) William T. Spence, (a) Plaintiff, Civil Action 2997-63, United States District Court for the District of Columbia, and (b) Plaintiff, Attachment Action No. 96-86, Circuit Court of Arlington County, Virginia, and to Enjoin (2) First National Bank of Arlington, and (3) For Order to Show Cause why the Escrow Deposit in said Bank should not be Turned over to the Trustee, and good cause therefor having been alleged; and it appearing that William T. Spence should immediately be enjoined from further pursuing and prosecuting suits filed in the United States District Court for the District of Columbia, Civil Action No. 2997-63, and in the Circuit Court of Arlington County, Virginia, attachment action No. 96-86, and likewise that the First National Bank of Arlington should be enjoined in the manner and for the reasons specified in said Motion, and that William T. Spence, the First National Bank of Arlington, and Stephen E. Balogh should show cause to this court why said actions should not be permanently enjoined, and why the property of the bankrupt in

said bank should not be turned over to the Trustee, and all claims thereagainst asserted as well as all claims asserted by any of said parties against the bankrupt growing out of matters growing out of said complaint should not be asserted in this proceeding, IT IS

ORDERED that William T. Spence, his agents, attorneys and representatives, be and he hereby is restrained ex parte from pursuing further action in Civil Action No. 2997-63 in the United States District Court for the District of Columbia, or in attachment action No. 96-86 in the Circuit Court for Arlington County, Virginia, or from commencing any further or other action, other than in the above-captioned proceeding, relating to or in respect to claim or claims subject of the above-numbered plenary actions; and it is further

ORDERED that the First National Bank of Arlington, its agents, attorneys and representatives, be and it hereby is restrained ex parte from further proceedings in connection with the action pending in the Circuit Court for Arlington County, Virginia, attachment proceeding No. 96-86, and from setting off or attempting to set off against any asset, credit, or property of the bankrupt in said bank any claim arising upon any alleged obligation to the bankrupt herein in the sum of $9,000.00, or in any sum whatsoever; and it is further

ORDERED that

William T. Spence
3715 Idaho Avenue, N. W.
Washington, D. C.

First National Bank of Arlington
801 North Glebe Road
Arlington, Virginia

Stephen E. Balogh
2144 California Street, N. W.
Envoy, Apt. #704
Washington, D. C.

show cause before this court on the 30 day of October, 1964, at 10 A.M. in Room 2104 United States Court House, Third Street and Constitution Ave., N. W., Washington, D. C.,

(1) Why William T. Spence, his agents, attorneys and representatives, should not be permanently enjoined from further pursuing his claims against the bankrupt and others as set forth in Civil Action No. 2997-63 in the United States District Court for the District of Columbia, and in attachment action No. 96-86 in the Circuit Court for Arlington County, Virginia, and why the claims subject of the said civil actions should not be asserted in this proceeding for summary adjudication by this court;

(2) Why the First National Bank of Arlington, its agents, attorneys and representatives, should not be enjoined from setting off or attempting to set off any claim it asserts against the bankrupt against such property, assets, deposits, or credits of the bankrupt in said bank and why it should not assert said claim for summary adjudication by this court in the above-captioned proceeding;

(3) Why such property, credit, assets, or deposits of the bankrupt corporation, or belonging to the bankrupt corporation for the benefit of its customers and creditors on deposit in the First National Bank of Arlington,

should not be turned over to the Trustee in Bankruptcy herein for deposit as an asset of the bankrupt estate for the benefit of its creditors.

and it is further

ORDERED that on or before five (5) days from the date of the hearing set herein, if said parties respondent oppose the granting of the relief prayed for in said Motion, that they shall cause written opposition thereof to be filed in this court and a copy of said opposition served upon Samuel M. Greenbaum, Esq., attorney for the Trustee in Bankruptcy, 401 Tower Building, Washington, D. C. 20005; and it is further

ORDERED that the Trustee in Bankruptcy be and he hereby is directed to cause a certified copy of this Order and the Motion appended hereto to be served by first class mail, postage prepaid, upon the aforenamed respondents at the addresses hereinabove set forth, and, in addition thereto, upon:

Cornelius H. Doherty, Esq.
Attorney of record for William T. Spence
1010 Vermont Ave., N. W.
Washington, D. C. 20005

Peter J. Kostik, Esq.
Attorney for First National Bank of Arlington
2046 Wilson Blvd.
Arlington, Virginia

Kieffer & Maroney
Attorneys for Stephen E. Balogh
Suite 1037
1875 Connecticut Ave., N. W.
Washington, D. C.

and further, said Trustee is directed to cause a certified copy of this Order to be served by mail or personally upon:

Clerk, Civil Division
U. S. District Court for the District of Columbia
Third Street and Constitution Ave., N. W.
Washington, D. C.

with a request that said Order be docketed in the pending action in said court above designated, and to the

Clerk,
Circuit Court for Arlington County
Arlington, Virginia

with a request that said Order be docketed in the pending action in said court above designated.

PROVIDED further, that said Trustee shall cause the service of the foregoing copies to be made on or before five (5) days from the date of the entry of this Order and shall certify to said service.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

O R D E R

1. Denying the claim of Dr. William T. Spence to $12,200 escrow deposit;
2. Denying the claim of the Trustee in Bankruptcy to the outright and unencumbered ownership of the $12,200 escrow deposit;
3. Denying the claim of the First National Bank of Arlington to a right of setoff of $9,000 promissory note of the bankrupt against the $12,200 escrow deposit;
4. Directing the First National Bank of Arlington to turn over the sum of $12,200 escrow deposit to the Trustee in Bankruptcy;
5. Directing initiation of appropriate proceedings by Dr. William T. Spence and other potential claimants to the escrow fund; and
6. Directing dismissal of pending actions against the bankrupt.

AT WASHINGTON, D. C., this 20th day of February, 1968.

This matter was initiated by the Trustee's Motion to Enjoin (1) Dr. William T. Spence, (a) plaintiff in Civil Action No. 2997-63 in this Court and (b) plaintiff in Attachment Action No. 96-86 in the Circuit Court of Arlington County, Virginia; and to enjoin (2) First National Bank of Arlington; and (3) for an order to show cause why the escrow deposit in said bank should not be turned over to the Trustee in Bankruptcy; and, upon consideration of the timely answers filed by Dr. Spence and the First National Bank of Arlington, the testimony and evidence adduced upon hearing held on pleadings filed, the oral argument and written memoranda of counsel for the respective parties, this Court prepared an exhaustive memorandum of findings of fact and conclusions of law under date of December 29, 1967, and has furnished counsel for the respective parties a copy thereof. Subsequently on February 15, 1968, the parties filed an Agreed Statement of Additional Facts for the purpose of correcting errors in the December 29, 1967 Memorandum, and, on February 20, 1968, this Court prepared a supplemental memorandum correcting the errors established by the additional facts presented and by a typographical error, involving an amount of money, made by the Referee in Bankruptcy. Said Memorandum of December 29, 1967, as corrected by the supplemental memorandum dated February 20, 1968 is adopted and incorporated herein by reference as if fully set forth herein as the Court's findings of fact and conclusions of law. WHEREUPON, IT IS

ORDERED:

1. That the claim of Dr. William T. Spence to the full balance of $12,200 in the Balogh & Company, Inc., escrow account in the First National Bank of Arlington is denied;

2. That the claim of Edward J. McGrath, Trustee in Bankruptcy, to the outright and unencumbered ownership of the said escrow balance of $12,200

in the Balogh & Company, Inc., escrow account is denied;

3. That the claim of the First National Bank of Arlington to a right of setoff of its $9,000 note owed by Balogh & Company, Inc., against the $12,200 deposit in the escrow account is denied;

4. That the $12,200 escrow account shall be turned over by the First National Bank of Arlington to Edward J. McGrath, Trustee in Bankruptcy, upon entry of this Order, subject to the initiation in this Court in this proceeding, within 30 days from the dateof entry of this Order, by Dr. William T. Spence, Dr. John T. Hazel, Dr. William D. Dolan, Dr. Raymond Schwartz, and Dr. Arthur V. Mitchell, or any of them (doctors apparently contributing to said escrow fund), by appropriate pleading undertaking to establish their claim(s) to the sum of $12,200 in the hands of the Trustee resulting from turnover by the First National Bank of Arlington to the Trustee of the said balance in the Balogh & Company, Inc. escrow account, and reserving to the Trustee in Bankruptcy any and all defenses, rights and counterclaims that he may assert against such proceedings. Provided, however, that in the event all or any of said contributing doctors shall fail within the time provided to file appropriate pleading(s) asserting entitlement to a portion of said escrow fund, then any claim(s) of such individual(s) is hereby deemed upon such failure to be forever barred against the said fund, the Trustee in Bankruptcy herein, the bankrupt corporation, or the First National Bank of Arlington;

5. That (a) Civil Action No. 2997-63, initiated by Dr. William T. Spence against the bankrupt herein in this Court, and (b) Attachment Action No. 96-86 initiated by Dr. William T. Spence against the bankrupt herein in the Circuit Court of Arlington County, Virginia, be and the same hereby are directed to be dismissed by counsel for Dr. William T. Spence, plaintiff in said suits, forthwith upon entry of this Order;

6. That upon entry of this Order, a Clerk of this Court shall serve by franked mail a certified copy hereof upon each of the following at the addresses shown, and shall certify to the mailing thereof:

Dr. William T. Spence
1234 - 19th Street, N.W.
Washington, D. C. 20036

Dr. John T. Hazel
220 Culpeper Street
Warrenton, Virginia

Dr. William D. Dolan
5129 - 16th Street, North
Arlington, Virginia 22205

Dr. Raymond Schwartz
1029 N. Stuart Street
Arlington, Virginia 22201

Dr. Arthur V. Mitchell
4682 - 34th Street, South
Arlington, Virginia

Cornelius H. Doherty, Sr., Esq.
Attorney for Dr. Spence
1010 Vermont Avenue, N.W.
Washington, D. C. 20005

Peter J. Kostik, Esquire
Attorney for First National Bank of Arlington
2046 Wilson Blvd.
Arlington, Virginia

Edward J. McGrath, Esquire
Trustee in Bankruptcy
401 Tower Building
Washington, D. C. 20005

Samuel M. Greenbaum, Esquire
Attorney for the Trustee
401 Tower Building
Washington, D. C. 20005

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

ORDER DENYING MOTIONS FOR LEAVE TO FILE PETITIONS TO RECLAIM PROPERTY FROM TRUSTEE
(Drs. William T. Spence, Raymond Schwartz, William D. Dolan, and John T. Hazel

At WASHINGTON, D.C., this 20th day of June, 1968.

The motions of Drs. William T. Spence, Raymond Schwartz, William D. Dolan, and John T. Hazel for leave to file petitions to reclaim property, the sum of $12,200.00 previously in an escrow account of the bankrupt in the First National Bank of Arlington and now in the possession of the Trustee in Bankruptcy, came on for hearing before this Court on the 7th day of May, 1968; and upon consideration of the written responses to said motions, filed in this proceeding by the Trustee in Bankruptcy, and upon further consideration of the argument in open court of Cornelius H. Doherty, counsel for the petitioners, in support of said motions, and of Samuel M. Greenbaum, counsel for the Trustee, in opposition thereto, this Court took this matter under advisement and after due deliberation prepared and filed, on June 14, 1968, its memorandum entitled "Memorandum of Referee in Bankruptcy (Motions for Leave to File Petitions to Reclaim Property)" wherein this Court reviewed the relevant facts and made its findings of fact and conclusions of law. The said Memorandum is adopted in this Order as this Court's findings of fact and conclusions of law and is incorporated herein by reference.

WHEREUPON, IT IS

ORDERED that the motions of Drs. William T. Spence, Raymond Schwartz and William D. Dolan for leave to file petitions to reclaim

$4000.00 each, and the motion of John T. Hazel for leave to file a petition to reclaim $1000.00, in accordance with the order of February 20, 1968, of the $12,200.00 turned over to the Trustee in Bankruptcy by the First National Bank of Arlington, subject to the initiation in this Court in this proceeding by Drs. William T. Spence, Raymond Schwartz, William D. Dolan and John T. Hazel by appropriate pleading undertaking to establish their claims to the $12,200.00, be, and the same hereby are, denied; and it is further

ORDERED that this Court's Memorandum dated June 14, 1968, be, and the same hereby is, adopted and incorporated herein by reference as and for this Court's findings of fact and conclusions of law; and it is further

ORDERED that the Clerk of this Court shall serve copies of this Order by franked mail upon each of the following:

Cornelius H. Doherty, Esquire
Attorney for Drs. Spence, Schwartz, Dolan and Hazel
1010 Vermont Avenue, N. W.
Washington, D. C. 20005

Edward J. McGrath, Esquire
Trustee in Bankruptcy
401 Tower Building
Washington, D. C. 20005

Samuel M. Greenbaum, Esquire
Attorney for the Trustee
401 Tower Building
Washington, D. C. 20005

[Subscription Omitted in Printing]

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PETITION FOR REVIEW

To:

John A. Bresnahan,
Referee in Bankruptcy

The petition of Drs. William T. Spence, Raymond Schwartz, and William D. Dolan, and each of them, respectfully represents:

Your petitioners, and each of them, are aggrieved by the order of John A. Bresnahan, Referee in Bankruptcy, by reason of his order of June 20, 1968, denying the motion to file a petition to reclaim Four Thousand ($4000.00) Dollars each of the twelve Thousand Two Hundred ($12,200.00) Dollars in accordance with the terms of his order of February 20, 1968, and the said John A. Bresnahan, Referee in Bankruptcy, erred in the said order in the following respects:

The referee had no jurisdiction or authority over the said fund.

That the fund was an escrow account to which the bankrupt had no interest.

That the motion of each petitioner for leave to file their petition for leave to reclaim their property was timely and in accordance with the order of Referee.

That the Referee erred in not permitting the petitioners, and each of them, to file their petition without the necessity of filing a motion for leave to file in accordance with the order of February 20, 1968.

That the findings of the Referee as to the parties was unjust and unreasonable and not based upon the record.

And for such other and further reasons as may be disclosed by the record herein.

WHEREFORE, your petitioners, Drs. William T. Spence, Raymond Schwartz, and William D. Dolan, pray:

1. That said order be reversed by a judge in accordance with the provisions of the Act of Congress relating to bankruptcy.

2. That an order be entered herein directing the Trustee in Bankruptcy to pay to each of your petitioners the sum of Four Thous and ($4000.00) Dollars due them according to the record herein.

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[Certificate of Service Omitted in Printing]

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ORDER AFFIRMING REFEREE IN BANKRUPTCY
AND DISMISSING PETITION FOR REVIEW [COPERT M.S.]
(Drs. William T. Spence, Raymond Schwartz and William D. Dolan)

At WASHINGTON, D. C., this ___ day of November, 1968:

This matter came on for hearing on the 29th day of October, 1968, upon the Petition for Review filed by Drs. William T. Spence, Raymond Schwartz and William D. Dolan seeking review of an order of John A. Bresnahan, Referee in Bankruptcy, entered June 20, 1968, entitled "Order Denying Motions for Leave to File Petitions to Reclaim Property from Trustee (Drs. William T. Spence, Raymond Schwartz, William D. Dolan and John T. Hazel)", and upon consideration of the Referee's Certificate on Petition to Review and Referee's Supplemental Certificate on Petition to Review and the record of the proceedings before the Referee incorporated in said Certificates, and upon further consideration of the extensive oral arguments of

counsel for petitioners and counsel for the Trustee in Bankruptcy, this court took the matter under consideration; and upon due deliberation, IT IS

ORDERED that the Referee's Order Denying Motions for Leave to File Petitions to Reclaim Property from Trustee (Drs. William T. Spence, Raymond Schwartz, William D. Dolan and John T. Hazel), entered June 20, 1968, incorporating the Memorandum of Referee in Bankruptcy (Motions for Leave to File Petitions to Reclaim Property) dated June 14, 1968, containing findings of fact and conclusions of law upon which said order was premised, and which was incorporated in said order, be and the same hereby is affirmed and the Petition for Review of Drs. William T. Spence, Raymond Schwartz and William D. Dolan be and the same hereby is dismissed.

Judge

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

Order Denying Petition For Rehearing And Granting Motion To Strike Answer To Objection For Rehearing Filed On Behalf Of Drs. Spence, Dolan and Schwartz

AT WASHINGTON, D.C., this 30th day of December, 1968.

This matter came on for hearing upon the Petition for Rehearing on Petition for Review filed by Drs. William T. Spence, William D. Dolan and Raymond Schwartz seeking a rehearing on this court's affirming the Referee in Bankruptcy and dismissing the Petition for Review; and upon consideration of said Petition for Rehearing, the response thereto filed by the Trustee in Bankruptcy, the Answer to Objection for Rehearing, filed on behalf of

Drs. Spence, Dolan and Schwartz, and the Trustee's Motion to Strike Answer to Objection for Rehearing, this court, upon due deliberation, finds that the Petition for Rehearing on Petition for Review should be denied, and the Trustee's Motion to Strike the Answer to Objection for Rehearing shall be granted,

WHEREUPON, IT IS

ORDERED that the Petition for Rehearing on Petition for Review, filed by Drs. William T. Spence, William D. Dolan and Raymond Schwartz, be and the same hereby is denied; and it is further

ORDERED that the Trustee's Motion to Strike Answer to Objection for Rehearing Filed on Behalf of Drs. Spence, Dolan and Schwartz, be and the same hereby is granted

(SIGNED) HOWARD F. CORCORAN

Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,755

IN THE MATTER OF BALOGH & COMPANY, INC.,

Bankrupt

DRS. WILLIAM T. SPENCE, WILLIAM D. DOLAN, RAYMOND SCHWARTZ,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N.W.
Washington, D.C. 20005
Attorney for Appellants

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,755

IN THE MATTER OF BALOGH & COMPANY, INC.,

Bankrupt

DRS. WILLIAM T. SPENCE, WILLIAM D. DOLAN, RAYMOND SCHWARTZ,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

STATEMENT OF ISSUES*

Does the Bankruptcy Court have jurisdiction, summary or otherwise, of a foreign attachment proceeding issued and served more than four months prior to the instigation of the bankruptcy proceeding?

Is there any time limit as to when a plea to the jurisdiction of a Court may be filed?

---

*This case has not previously been presented to this Court.

JURISDICTIONAL STATEMENT

This is an appeal by Drs. William T. Spence, William D. Dolan and Raymond Schwartz from a judgment in favor of the Trustee, Edward J. McGrath, Trustee for Balogh & Company.

William T. Spence, William D. Dolan and Raymond Schwartz were petitioners in the United States District Court for the District of Columbia for a review of the action of the Trustee, and the appellants here, Spence being the original party, having been brought into the bankruptcy proceedings by a rule to show cause issued by the Referee, and the parties on the appeal will be hereafter referred to as "Spence".

Jurisdiction was conferred on the District Court by the provisions of Section 306, Title 11 of the 1961 Edition of the Code of the District of Columbia, and on this Court by Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

About August 1, 1959, Spence personally arranged with Balogh & Company to buy 6220 shares of the stock of Northern Virginia Doctors Hospital Corporation, which was being sold by Balogh & Company under an exclusive contract with Northern Virginia Doctors Hospital Corporation.

Spence arranged with various other doctors to divide up the stock and $62,200.00 was delivered to Balogh & Company on August 5, 1959. The Northern Virginia Doctors Hospital Corporation alleges that Balogh & Company had violated their contract and would not issue the stock, and the $62,200.00 was placed in an escrow account in the First National Bank of Arlington, Virginia, to be withdrawn only for the purpose of payment of the 6220 shares of stock of the Northern Virginia Doctors Hospital Corporation, and

such withdrawal was subject to the signature of the President of the First National Bank of Arlington, Virginia.

In 1963 Balogh & Company released by check $50,000.00 of the fund, leaving $12,200.00 in the account.

In March of 1964, Balogh personally issued a check on this fund for approximately $10,000.00 to pay a personal obligation, and on March 30, 1964, Spence filed a foreign attachment in the Circuit Court of Arlington County, Virginia, on the fund in the First National Bank of Arlington, Virginia, and the attachment was properly issued and served (J.A. 6).

On August 19, 1964, Balogh & Company went into bankruptcy, and a rule to show cause was issued to Spence by the Referee to show cause why he should not be restrained from proceeding further in the Circuit Court of Arlington County, Virginia (J.A. 7), and on September 17, 1964, Spence was permanently enjoined from proceeding further in the attachment proceeding. (J.A. 12).

Thereafter, the Referee issued a memorandum, dated December 27, 1967, amended to February 20, 1968, denying Spence's claim to the $12,200.00; denying to the Trustee the unencumbered right to the sum and by this order of February 20, 1968, gave Spence, Schwartz, Dolan and others thirty (30) days to file their claim to the $12,200.00 (J.A. 16), and the Referee, by his order of June 20, 1968, denied the petition of Spence and others to file their claims to the $12,200.00 (J.A. 20).

A petition to reverse the action of the referee, filed in the United States District Court for the District of Columbia, was denied on November 21, 1968 (J.A. 23), and a petition for a rehearing, setting up the question of jurisdiction of the Bankruptcy Court (J.A. 24), was denied without hearing.

STATEMENT OF POINTS

The Court erred in refusing to sustain the plea of jurisdiction of the Bankruptcy Court filed on behalf of appellants.

SUMMARY OF ARGUMENT

The Bankruptcy Court is a Court of limited jurisdiction and it is contended that the Bankruptcy Court had no jurisdiction over the funds of Spence in the First National Bank of Arlington, Virginia, which was under attachment by Spence on March 30, 1964.

ARGUMENT

The question of the jurisdiction of the Bankruptcy Court is governed by Title 11, Section 107(a)(1) of the United States Code Annotated of the Bankruptcy Act, which contains the following:

> "Liens and fraudulent transfers.
>
> "Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this title: Provided, however, That if such person is not finally adjudged a bankrupt in any proceeding under this title and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided."

A case similar to the one before the Court in this case was heard in the United States District Court in Pennsylvania, and

known as *Consolidated Container Carriers, Inc.*, in a bankruptcy proceeding, and reported in 254 F. Supp. 605, where a creditor, more than four months prior to the filing of the bankruptcy proceeding petition, had commenced an action against debtors in a state court by means of a writ of foreign attachment, and the Court held that the Bankruptcy Court did not have summary jurisdiction over this matter.

The case was appealed to the Third Circuit Court of Appeals and titled "In the Matter of Consolidated Container Carriers, Inc., Bankrupt, Maurice Steam, Trustee, Appellant, 385 Fed. Rep. Second Series, 362" decided September 28, 1967, and a rehearing denied October 26, 1967, wherein that Court, on page 365, made the following statement:

> "The Act of 1836 and those cases concerning the effect of a foreign attachment make it perfectly clear that the writ acts to dispossess the defendant by placing the property in custodia legis. If such dispossession should occur more than four months prior to bankruptcy, summary jurisdiction in the bankruptcy court would be precluded."

The Court further stated, at page 365, the following:

> "We believe that the above quoted language correctly states the appropriate rule with respect to the bankruptcy court's summary jurisdiction in this case. There is no basis for a summary proceeding here since Acme's foreign attachment divested the bankrupt of his possessory interest in the fund and transferred constructive possession of it to the state court."

The foreign attachment laws of Virginia are substantially the same as the Pennsylvania law referred to in the foregoing case, and the following reference sustained this fact:

Title 8, Section 533 of the 1950 Code of Virginia commands the Sheriff to attach the specific property claimed in the petition and to take possession under Title 8, Section 538, and to keep the same safely in his possession to satisfy any judgment that may be recovered by the plaintiff in such attachment.

The attachment laws of Virginia are very well covered in the *First National Bank of Waynesboro v. R. H. Johnson, et al.*, 183 Va. 227, 31 S.E.2d 581, decided October 9, 1944. The Court, at page 235, made the following statement:

> "Under the attachment statutes, the officer is not required to take possession of the property unless the plaintiff in the attachment suit gives bond as required by section 6384 of the Code of 1919. A party in possession, with knowledge of the levy, transfers the property at his peril. A. R. Harding, who acquired no title by his purchase from the Standard Oil Company, had no right to convert the tangible personal property upon which the levy had been made into a chose in action and plead set-off against Johnson or attaching creditors."

It is admitted in the Referee's Findings of Fact that the attachment was issued and properly served prior to the filing of the bankruptcy petition by Balogh and it is apparent that where the petition was filed on the 30th of March, 1964, and the bankruptcy petition was not filed until August 19, 1964, that the attachment was issued more than four months prior to the bankruptcy.

The question of the jurisdiction of the Bankruptcy Court was before the Fourth Circuit Court of Appeals in the case of *Griffin, et al., v. Lenhart, et al.*, 266 F.2d 671, decided April 17, 1920, where that Court, in passing upon Title 11, Section 107(a)(1) of the Bankruptcy Act, made the following statement at page 673:

> "Doubtless it might have been held with strong reason that the court of bankruptcy upon adjudication drew to itself for the purpose of administration all the assets and liabilities of the bankrupt of every form, giving, however, full effect to all liens lawfully acquired more than four months before the filing of the petition. But the Supreme Court, considering the reasons stronger for a different view, laid down the general rule that, where a state court had obtained complete jurisdiction by proceedings, either legal or equitable, instituted by creditors for the enforcement of their demands, and under which they have acquired liens upon the property more than four months before the filing of the petition, the state courts should proceed with the enforcement of the liens and a final disposition of the property and of the cause without interference from the bankruptcy court."

Again that Court, at page 674, made the following additional statement:

> "We shall not undertake the hopeless task of reconciling the apparently conflicting reasoning of the courts in other important cases bearing on the subject. We venture to think, however, that there is a distinction under which the cases relied on by appellees will, in actual adjudication, turn out to be entirely consistent with each other, and with all the cases above cited. It is this: Where a state court has obtained complete jurisdiction by hostile proceedings, which creditors have instituted for the enforcement of their demands, and in which creditors have acquired liens on property more than four months before the filing of the petition in bankruptcy, the disposition of the property for payment of the liens should be left to the state court, without interference

> from the court of bankruptcy. In such case the trustee in bankruptcy is interested only in the surplus proceeds of sale, and in having the suit in the state court pressed with due diligence."

It is submitted that the foregoing decision of the Federal Courts of Appeal sustain the petition of Spence that the Bankruptcy Court had no jurisdiction of the matter before this Court.

A Plea to the Court's Jurisdiction May Be Made at Any Time

Throughout this case the Trustee has relied upon what he contends was the summary jurisdiction of the Bankruptcy Court which has been recited numerous times by both the Trustee and the Referee, but in order to have summary jurisdiction it is necessary that the Court have original jurisdiction of the proceedings and the question of jurisdiction of any Court, and definitely the Bankruptcy Court, may be raised at any time. *Alexander v. Westgate,* 111 F.2d 769.

In the case of *Duvall v. Southern Municipal Corporation,* 63 Atl. 2d 336, the Court, at page 338, made the following statement:

> "Furthermore, it is fundamental that jurisdiction over the subject matter of a case may never be conferred by consent and may even be questioned for the first time on appeal."

The question of jurisdiction was very fully discussed in the case of *Jackson v. Kuhn,* 254 F.2d 555, Eighth Circuit Court of Appeals, decided April 28, 1958, and the following are excerpts taken from the opinion in that Court.

On page 559 of the opinion the Court made the following statement:

> "That the lower federal courts are courts of limited jurisdiction and have only the jurisdiction that Congress has conferred upon them by statute, has become a truism. *Kaufman v. Liberty Mutual Insurance Company*, 3d Cir., 245 F.2d 918, 919."

And again on the same page the following:

> "Rule 12(h) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides 'that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.' It is the duty of a federal district court to dismiss an action whenever the court is satisfied that a controversy within its jurisdiction is not involved. *Fisch v. General Motors Corporation*, 6 Cir., 169 F.2d 266, 269; *McNutt v. General Motors Acceptance Corp., supra*, at page 182 of 298 U.S., at page 782 of 56 S. Ct.
>
> "Furthermore, a federal appellate court must in every case coming before it for review satisfy itself of its own jurisdiction and that of the district court. In *Kern v. Standard Oil Company*, 8 Cir., 228 F.2d 699, 701, this Court said:
>
> 'Lack of jurisdiction of a federal trial court touching the subject matter of litigation cannot be waived by the parties or ignored by a federal appellate court, *Chicago, Burlington & Quincy Railway Co. v. Willard, supra*, (220 U.S. 413) at pages 419-421 of 220 U.S., at pages (460) 461-462 of 31 S. Ct. (55 L. Ed. 521), and if jurisdiction does not exist the trial court must of its own motion decline to proceed in the case. *United States v. Corrick*, 298 U.S. 435, 440, 56 S. Ct. 829, 80 L. Ed. 1263. If a federal district court tries a case with respect to which jurisdiction is lacking, the jurisdiction of the appellate court, on

> review, extends only to correcting the error of the trial court in entertaining the action.'"

The Court further, on page 560 of its opinion, made the following statement:

> "It is incumbent upon a plaintiff to allege the jurisdictional facts. 'He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. * * * If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.' *McNutt v. General Motors Acceptance Corp., supra*, at page 189 of 298 U.S., at page 785 of 56 S. Ct."

CONCLUSION

The record before this Court discloses that Spence filed and served a foreign attachment on the funds in the First National Bank of Arlington, Virginia, more than four months prior to the instigation of bankruptcy proceedings by Balogh & Company, and that the Bankruptcy Court took over the jurisdiction of these funds and permanently restrained Spence from taking any further action in the matter pending in the Circuit Court of Arlington County, Virginia.

The record further shows that the plea to the jurisdiction of the Court was properly and timely filed and that the record and the decisions of substantial courts indicate clearly that the Bankruptcy Court had no jurisdiction, summary or otherwise, over the fund and that the matter should be reversed with directions to the Bankruptcy Court to return the funds, with interest thereon, to the First National Bank of Arlington, Virginia.

Respectfully submitted,

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In the

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 22,755

IN THE MATTER OF BALOGH & COMPANY, INC.,
Bankrupt

DRS. WILLIAM T. SPENCE, WILLIAM D. DOLAN,
RAYMOND SCHWARTZ,
Appellants

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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In the

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No. 22,755

IN THE MATTER OF BALOGH & COMPANY, INC.,

Bankrupt

DRS. WILLIAM T. SPENCE, WILLIAM D. DOLAN, RAYMOND SCHWARTZ,

Appellants

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

STATEMENT OF ISSUES *

1. May adverse claimants to an escrow account in the name of a bankrupt object to the summary jurisdiction of the Bankruptcy Court by raising the issue for the first time upon a review of the Referee's adverse decision on the merits?

2. Does the adverse claimants' express consent to the Bankruptcy Court's summary jurisdiction over funds in the bankrupt's escrow account preclude later objections to summary jurisdiction raised for the first time on a petition for review of a decision on the merits approximately 3-1/2 years after entry of an order of the Bankruptcy Court expressly decreeing summary jurisdiction in itself over the escrow fund, from which order no review was sought nor appeal taken?

---

* This case was not previously before this court.

3. Does the adverse claimants' prayer for affirmative equitable relief in requesting that the court direct the funds in the escrow account be turned over to them and at a subsequent time petitioning for affirmative equitable relief vest summary jurisdiction by implied consent over the issue as to title to the fund irrespective of actual or constructive possession of the fund in the Trustee in Bankruptcy?

4. Does the failure of the adverse claimants to object within the time prescribed by order of court to its summary jurisdiction vest summary jurisdiction over the escrow account and all controversies relating thereto by the implied consent statutorily provided in the Bankruptcy Act?

5. Does an appeal from an order of the District Court denying petition to rehear petition for review of Referee's order, which the District Court had sustained, which order of the Referee was entered upon the merits of the claim of adverse claimants to an escrow fund, entitle the adverse claimants to appeal on an objection to summary jurisdiction not previously made before the Referee and which was not an issue in the Referee's order upon which review and appeal was taken?

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Columbia in bankruptcy proceedings is pursuant to Title 11 U. S. C. 11 and 46 (Bankruptcy Act, Sections 2 and 23).

The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit in this matter is pursuant to Title 11 U. S. C. 47 (Bankruptcy Act, Section 24).

STATEMENT OF THE CASE

Motions of Drs. William T. Spence ("SPENCE"), Raymond Schwartz, and William D. Dolan, appellants herein (collectively referred to as "DOCTORS"), for leave to file petitions to reclaim property from the Trustee in Bankruptcy, were denied by the order dated June 20, 1968, of the Referee in Bankruptcy of the United States District Court for the District of Columbia (J.A. 20). It is from this order that the Doctors appealed. The Doctors sought leave to file petitions to reclaim money which on the date of bankruptcy, August 19, 1964, was in an account in the First National Bank of Arlington ("BANK") maintained in the name of "Balogh & Company, Inc., Escrow Account" ("ESCROW ACCOUNT"). This account was originally opened in the Bank on September 22, 1959, with a deposit of $62,200.00 representing an amount advanced by the Doctors, and other doctors not appellants herein, for the purchase of 6,220 shares of the stock of Northern Virginia Doctors Hospital Corporation ("STOCK"), a new issue being marketed through Balogh & Company, Inc., the bankrupt ("BANKRUPT" or "COMPANY"), an over-the-counter securities broker-dealer in the District of Columbia.

A complete chronology of the events, negotiations, and facts underlying the claims of the Doctors is set forth in the Memorandum of the Referee in Bankruptcy dated December 29, 1967 (J.A. 85-115). As the Referee's memorandum discloses, there had ensued between Spence and the Doctors on the one part, and the Bankrupt on the other part, extensive litigation, both in the courts of Virginia and the District of Columbia, all initiated by Spence in an effort to acquire the Stock, or, when litigation to acquire the Stock was decided adversely to Spence, then he sought to recover the funds in the Escrow Account. The other Doctors, appellants herein, were parties plaintiff only in the initial suit filed jointly with Spence in the Circuit Court of Arlington County, Virginia (Chancery No. 10899), against the Hospital to compel

the issuance of the Stock. The $62,200.00 in the Escrow Account was deposited pending the outcome of the litigation between Spence, the other Doctors, and the Hospital, and subject to the withdrawal only for (1) the purchase of the Stock and (2) payment of the commissions to Balogh & Company, Inc. (J.A. 90). The said account was further subject to the supervision of Walter J. O'Donnell, president of the Bank, "acting as a de facto trustee for the doctors who had advanced the funds." (J.A. 90). However, only Stephen E. Balogh, president of the Bankrupt, had signature authority of withdrawal of funds from the Escrow Account. O'Donnell did not have any signature control on the Escrow Account.

In March 1964 the Company issued a check drawn on the Escrow Account to the Bank for $9,338.00 to pay off a $9,000.00 note, plus interest, signed by Stephen E. Balogh, as a substitute for the Company's $9,000.00 note previously signed (J.A. 95).

On March 30, 1964, Spence, continuing his unceasing, multiple course of litigation against the Company which originally began on September 18, 1959, with the suit by Spence and other Doctors against the Hospital, filed in the Circuit Court for Arlington County, Virginia, a notice of Motion for Judgment in Attachment Action No. 96-86 (J.A. 4-6). The record is without any indication as to the exact date on which the attachment was levied upon the Bank pursuant to the attachment action filed. However, the Referee's memorandum of December 29, 1967, states that six or seven days after the issuance of the check by the Company, the Bank advised that a new Spence action had been initiated against the Company (J.A. 95).

The Company filed a voluntary petition in bankruptcy on August 19, 1964 (J.A. 2-3). Edward J. McGrath ("TRUSTEE"), an attorney practicing before this court, was appointed by the Referee in Bankruptcy as Trustee in Bankruptcy and has since his appointment and qualification continuously served in such capacity.

On the date of bankruptcy there remained in the Escrow Account in the Bank a balance of $12,200.00 under attachment in the attachment action in the Circuit Court

of Arlington County, Virginia, No. 96-86 (J.A. 4-6). Apparently, ever since the failure and adverse decision of the initial suit filed by Spence and the other Doctors against the Hospital on September 18, 1959, the Doctors, with the exception of Spence, abandoned any active role in litigation or legal proceedings initiated by Spence in an effort to claim all the funds remaining in the Escrow Account. On the date of bankruptcy, Spence was (a) plaintiff in Civil Action 2997-63 in the United States District Court for the District of Columbia against the Company, and (b) plaintiff in the above-referenced attachment action in the Circuit Court of Arlington County. These suits were referred to in the schedules filed by the Company on Schedule A-2 under the claim of Spence, and on Schedule B-3(c) and B-3(d) (J.A. 159-161).

The Trustee retained Samuel M. Greenbaum as his attorney, pursuant to petition to and order of the Referee, and on September 17, 1964, filed a motion in the bankruptcy proceeding, inter alia, (a) to enjoin Spence from proceeding with the two pending suits and (b) to enjoin the Bank from disposition of the fund in the Escrow Account, and (c) for an order to show cause why the escrow deposit in the Bank should not be turned over to the Trustee (J.A. 31-36). In the third prayer for relief in the Trustee's motion (J.A. 35), the Trustee requested that Spence, the Bank, and Stephen E. Balogh, individually, show cause why the escrow funds should not be turned over to the Trustee and that any claims to said fund be asserted in the bankruptcy proceeding. The Bankruptcy Court's order of September 17, 1964, directed Spence, the Bank, and Stephen E. Balogh to show cause at a hearing set for October 20, 1964, why (a) Spence should not be permanently enjoined from pursuing claims against the Bankrupt and others in Civil Action 2997-63 and the attachment action, No. 96-86, and (b) why all claims should not be asserted in the bankruptcy proceeding for "summary adjudication" by the Bankruptcy Court (J.A. 29). Also,

by said order, the parties were directed to show cause why deposits of the Bankrupt, or belonging to the Bankrupt for the benefit of its customers and creditors, on deposit in the First National Bank of Arlington, should not be turned over to the Trustee for deposit as an asset of the bankrupt estate (J.A. 29). The time was fixed by said order for the parties, if they opposed the granting of the relief prayed for in Trustee's motion, to file written opposition in the Bankruptcy Court (on or before five days prior to the hearing set) (J.A. 30). Spence was restrained from pursuing the two pending suits and the Bank was restrained, until further order, from attempting any setoff in favor of the Bank against the Escrow Account of an alleged obligation of the Bankrupt to the Bank (J.A. 28). Spence, through his attorney, Cornelius H. Doherty, filed (a) an answer to the Order to Show Cause combined with (b) a petition or application "for an order directing the release of the funds to William T. Spence" (J.A. 36-41). Said answer is a response on the merits of the Trustee's motion. Said answer asserts that the Escrow Fund is not an asset of the Bankrupt by reason of Title 11 U.S.C. 96e(4) (J.A. 37).

In Spence's application for release of the funds, he impliedly acknowledges his control of and jurisdiction over the funds and prays for an order of the Bankruptcy Court " * * * releasing the Twelve Thousand Two Hundred ($12,200.00) Dollars and directing the First National Bank of Arlington to pay over to William T. Spence the sum of Twelve Thousand Two Hundred ($12,200.00) Dollars" (J.A. 41). Notwithstanding the Trustee's affirmatively invoking the summary jurisdiction of the Bankruptcy Court (J.A. 35), there was no plea or objection to the summary jurisdiction of the Bankruptcy Court nor did Spence assert that the Escrow Fund (a) was not under the summary jurisdiction of the Bankruptcy Court, or (b) was not in the actual or constructive possession of the Bankrupt, or (c) under the Spence attachment action, divested the Bankrupt of possession of the Escrow Account (J.A. 36-41).

The Bank filed an answer on the merits stating, inter alia, that the Bank was not advised as to what arrangements exist between Spence and the Bankrupt with respect to ownership of the funds beyond prior allegations made. The Bank also acknowledged the Bankruptcy Court's summary jurisdiction stating that it was holding the said funds pending the further order of the Bankruptcy Court (J.A. 54).

At the hearing on October 22, 1964, on the Order to Show Cause, counsel for the Bank made a slight amendment to paragraph 10 of its answer, its counsel stating: "I would like to amend that to say, 'pending the further order of the Circuit Court for Arlington County, Virginia,' because, actually, we had filed an answer in that suit -- and substantially the same thing -- because this court action here has taken precedence over the other." (referring to the attachment action in the Circuit Court).

The Bankruptcy Court, on October 27, 1964, entered an order (J.A. 57-62), after the hearing, setting forth express findings of fact and conclusions of law, inter alia, (1) decreeing summary jurisdiction on all issues in the two pending Spence suits against Balogh and all counterclaims or defenses therein, (2) taking under advisement the turnover of the escrow deposit in the Bank, (3) withholding entry of permanent injunction upon assurances of counsel. Its findings conclude as to summary jurisdiction:

> "(1) As no timely objection has been made or filed by any respondent, this court should assume summary jurisdiction of the issues between the several respondents and the Trustee in Bankruptcy as framed in Civil Action No. 2997-63 in the United States District Court for the District of Columbia in which Balogh & Company is named defendant, and attachment action No. 96-86 in the Circuit Court for Arlington County, Virginia, in which William T. Spence is plaintiff and the bankrupt corporation, Stephen E. Balogh, and the

First National Bank of Arlington are named defendants, and all defenses and counterclaims and set-offs therein asserted;

* * *

"(3) The sum of $12,200.00 on deposit in the First National Bank of Arlington in the Balogh & Company Escrow Account shall remain therein subject to further order of this court, and the turnover thereof as petitioned for by the Trustee shall be taken under advisement;" (J.A. 59)

Thereupon, the court ordered, inter alia, that Spence and the Bank, as to all further proceedings and issues with the Trustee raised in the two pending suits, "and claims to the sum of $12,200.00 on deposit in the First National Bank of Arlington, be and the same hereby are decreed to be subject to the summary jurisdiction of this court;". (underscoring supplied) (J.A. 60-61). The Bankruptcy Court further ordered that "subject to the jurisdiction and until further order of this court the sum of $12,200.00 now on deposit in the First National Bank of Arlington in the name of Balogh & Company Escrow Account shall remain therein;". (underscoring supplied) (J.A. 61)

Counsel for the Doctors and the Bank affirmatively acknowledged no objection to the summary jurisdiction of the Bankruptcy Court during the hearing on October 22, 1964. (Tr. p. 53)

"THE REFEREE: You have no objection to the summary jurisdiction?

"MR. DOHERTY (counsel for the Doctors): No, I don't."

Counsel for the Bank, in reply to a similar question of the Referee, likewise indicated no objection:

"THE REFEREE: I understand that you do not have any objection, Mr. Kostik?

"MR. KOSTIK (counsel for the Bank): We have the funds, Your Honor. We are willing to pay them -- to do whatever is proper the Court says we should pay them if we don't have a claim on it.

"THE REFEREE: Well, I assumed that. If you don't plead to the summary jurisdiction, you consent to it.

"MR. DOHERTY: I plead ignorance anyway. But it wouldn't make any difference sofar as that is concerned, Your Honor, because the fund, I was going only on the fact that it was an escrow account.

"THE REFEREE: You want these issues settled?

"MR. DOHERTY: Just that one issue. That's all there is to it."

Spence was acting for Drs. Dolan, Schwartz, and John T. Hazel, as well as for himself, and had retained Cornelius H. Doherty as counsel for all doctors (J.A. 51-52 and Tr. pp. 31 and 32).

No petition for review or appeal from the order of the Bankruptcy Court of October 27, 1964, decreeing its summary jurisdiction over the Escrow Fund was undertaken. Thereafter, in compliance with the provisions of said order of October 27, 1964, a stipulated statement of pertinent material facts and framing of issues was submitted by counsel for the Trustee and counsel for Spence;and an Agreed Statement of Facts and an Additional Statement of Facts were prepared by counsel for Spence. These statements may be referred to in the original record and are designated, respectively, as documents No. 33 and 31 in the Referee's Supplemental Certificate on Petition to Review (J.A. 62-84).

No question or issue as to the summary jurisdiction of the Bankruptcy Court, actual or constructive possession of the escrow fund by the Bankrupt or the Trustee, or the effect of the attachment action, No. 96-86, filed March 30, 1964, was ever raised by Spence prior to his Petition to Review the order of June 20, 1968.

On February 20, 1968, upon hearings held, the Referee entered an

"Order (1) Denying the claim of Dr. William T. Spence to $12,200 escrow deposit; (2) Denying the claim of the Trustee in Bankruptcy to the outright and unencumbered ownership of the $12,200 escrow deposit; (3) Denying the claim of the First National Bank of Arlington to a right of setoff of $9,000 promissory note of the bankrupt against the $12,200 escrow deposit; (4) Directing the First National Bank of Arlington to turn over the sum of $12,200 escrow deposit to the Trustee in Bankruptcy; (5) Directing initiation of appropriate proceedings by Dr. William T. Spence and other potential claimants to the escrow fund; and (6) Directing dismissal of pending actions against the bankrupt" (J.A. 16)

The said order (J.A. 16) adopted and incorporated by reference the Memorandum of the Referee in Bankruptcy dated December 29, 1967 (J.A. 85), and the Supplemental Memorandum of the Referee in Bankruptcy dated February 20, 1968. The Referee, by his order of February 20, 1968 (J.A. 16), denied the claim of Spence to the full balance of $12,200.00 in the Escrow Account. The order provided a 30-day period from the date of the order for Spence as well as the other Doctors to assert " * * * by appropriate pleading * * * their claim(s) in the sum of $12,200 in the hands of the Trustee resulting from turnover by the First National Bank of Arlington to the Trustee of the said balance in the Balogh & Company, Inc. escrow account, and reserving to the Trustee in Bankruptcy any and all defenses, rights and counterclaims that he may assert against such proceedings" (J.A. 18). Pursuant to said order, the Doctors elected to file Motions for Leave to File Petitions to Reclaim Property from the Trustee, attaching thereto, as required by the Bankruptcy Rules of the United States District Court (Rule 68), Petitions to Reclaim Property from the Trustee, and

later filed substitute motions. Spence claimed the sum of $4,000.00 cash belonged to him. Dr. Schwartz and Dr. Dolan each claimed $4,000.00, and Dr. Hazel (who did not petition for review) claimed $1,000.00, or a total of $13,000.00, although the Escrow Account balance was $12,200.00. (J.A. 127)

The Trustee filed responses to the motions of the Doctors (J.A. 123), and stated, inter alia, that they failed to allege an adequate reason for failure timely to file the Petition to Reclaim Property pursuant to the rule of this court, and that since the Bankruptcy Court had determined by its order of February 20, 1968, incorporating the Referee's Memorandum Opinion of December 29, 1967, that Spence was not entitled to the $12,200.00 balance, and that he had failed to establish his entitlement during said proceeding and hearing to any portion thereof, that he should not at this time be given the right to claim a portion of the fund since denial of the right to the entire fund necessarily includes denial of the right to any portion thereof. The Bankruptcy Court, upon hearing held, entered a Memorandum of Referee on June 14, 1968 (Motions for Leave to File Petitions to Reclaim Property) (J.A. 130-145). The Referee's memorandum was incorporated into the Referee's Order Denying Motions for Leave to File Petitions to Reclaim Property from Trustee, entered June 20, 1968 (J.A. 20-21).

The Doctors in the Petition for Review stated for the first time opposition to the summary jurisdiction of the Bankruptcy Court over the Escrow Account (J.A. 22). Upon hearing on the Petition for Review and oral argument of counsel, Judge Howard F. Corcoran entered an order, dated November 21, 1968, affirming the Referee in Bankruptcy and dismissing the Petition for Review (J.A. 23-24). Thereafter, the Doctors filed a Petition for Rehearing on Petition for Review (J.A. 146-150) in which the Doctors' counsel cited cases relating to the provisions of Title 11 U.S.C. 107 (Bankruptcy Act, Section 67a) as to the summary jurisdiction of the Bankruptcy Court

to avoid attachment liens, i.e., liens through legal proceedings. which liens attached within four (4) months of bankruptcy. The Trustee's counsel filed a Response to Petition for Rehearing on Petition for Review (J.A. 150-154) to which the Doctors filed an Answer to Objection for Rehearing (J.A. 154). Thereafter, there was filed a Trustee's Motion to Strike Answer to Objection for Rehearing Filed on Behalf of Drs. Spence, Dolan and Schwartz (J.A. 155-158) in which the Trustee's counsel argues that the cases cited by the Doctors in their answer, although correctly setting forth the law, are entirely distinguishable (J.A. 155). The Trustee's motion further states that the Doctors lost sight of the issue upon which the Referee's order of June 20 was premised in denying the motions for leave to file petitions to reclaim property; that is to say, the application by the Referee of the unclean hands doctrine.

Judge Corcoran entered an order on December 30, 1968, denying the petition for rehearing and granting the Motion to Strike Answer to Objection for Rehearing filed on behalf of the Doctors (J.A. 24 - 25). The Doctors now appeal from the order of December 30, 1968, denying their Petition for Rehearing (J.A. 24). There is no appeal from the order of November 21, 1968, in which Judge Corcoran, acting on the Doctors' Petition for Review, affirms the Referee in Bankruptcy and dismisses the Petition for Review.

SUMMARY OF ARGUMENT

The Bankruptcy Court has summary jurisdiction to determine controversies in relation to property which is not in the actual or constructive possession of the bankrupt on the date of bankruptcy if (a) the adverse claimants to said property affirmatively consent to the summary jurisdiction, or (b) the adverse claimants' consent is implied by law.

The Doctors expressly consented to the summary jurisdiction of the Bankruptcy Court. They also impliedly consented to the summary jurisdiction of the Bankruptcy Court by (a) seeking its affirmative relief, and (b) failing to make timely objection to the exercise of its summary jurisdiction. Having failed to assert said timely objection, they may not raise the question of summary jurisdiction of the Bankruptcy Court thereafter.

ARGUMENT

Exclusive Summary In Rem Jurisdiction of the Bankruptcy Court

The Bankruptcy Court has exclusive summary jurisdiction over all controversies relating to property in the actual or constructive possession of the bankrupt on the date of bankruptcy. Where the property is not in the actual or constructive possession of the bankrupt on the date of bankruptcy, the Bankruptcy Court does not have the summary jurisdiction to determine controversies in relation thereto unless (a) the adverse claimants to said property either affirmatively consent to the summary jurisdiction, or (b) the adverse claimants' consent is implied by law.

Title 11 U. S. C. 11a(7), (Bankruptcy Act, Section 2a(7)), as amended in 1952 [1], contains the express provision of the Act in which consent is implied by virtue of the failure of the adverse party to file timely objections to the Bankruptcy Court's summary jurisdiction over the property in issue.

Consent is further recognized as a basis for jurisdiction under the Bankruptcy Act where otherwise plenary proceedings would be necessary by virtue of the provisions of 11 U. S. C. 46b (Bankruptcy Act, Section 23b) [2].

Consent to the summary jurisdiction of the Bankruptcy Court may further be implied by the assertion by the adverse claimant of a claim in the Bankruptcy Court for affirmative relief. Although the consent implied in this context is not statutorily provided for in the Bankruptcy Act, it has been so held in numerous cases culminating

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[1] "a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to -- * * *

"(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;".

[2] "b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

in the landmark decision of Katchen v. Landy, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed. 2d 391 (1966). Of course, where the adverse claimant expressly consents to the exercise of the summary jurisdiction by the Bankruptcy Court over controversies to property, whether or not said property is in the actual or constructive possession of the bankrupt on the date of bankruptcy, it follows without argument that the Bankruptcy Court may exercise such jurisdiction. Remington on Bankruptcy, 1953 Edition, Volume 5, at page 350, states:

> "One who, himself, invokes affirmative action by the bankruptcy court must be considered as having consented to its jurisdiction, as where he comes into the bankruptcy court and asks for surrender of property or a declaration that he is entitled to a lien thereon.[(4)]"
>
> (Citations in footnote reference: "Page v. Arkansas Nat. Gas Corp., 53 F.2d. 27, 19 ABR NS 24 (1931, CA Ark), affd. 286 US 269, 76 L.Ed. 1096, 52 S.Ct. 507.")

This doctrine was examined in Nicholas v. Peter Pan Snack Shop, Inc., 256 F.2d 349 (C.A. 5, 1958), where at page 354 the court called attention to "* * * the recent amendment to the Bankruptcy Law putting an end to the controversy as to what constituted consent on the part of adverse claimants to the summary jurisdiction of the referee." That court goes on to make reference to footnote material in which Section 2a(7) of the Act, and the legislative history surrounding the reaction to Cline v. Kaplan, 323 U.S. 97, 65 S.Ct. 155, 89 L.Ed. 97 (1944), are discussed in detail. The court then states, at page 356:

> "It is apparent, moreover, that under the test now contained in the Bankruptcy Law, Lanrose (the adverse claimant) consented to a disposition of its claim in the summary proceeding. It is true that before the referee entered his order, the attorneys for Lanrose had

filed a written brief in which they argued that the referee was without summary jurisdiction. This argument cannot, however, supplant the pleadings already on file wherein, as shown above, Lanrose did not object to the jurisdiction of the referee, but affirmatively prayed that the referee adjudicate its rights. The conclusion of the District Court that Lanrose did not consent to the referee's jurisdiction, quoted in footnote 4, supra, does not find support in the record, particularly in view of the quoted amendment to the Bankruptcy Act and its Congressional history referred to in footnote 14 infra."

The Court of Appeals for the Tenth Circuit discussed this same doctrine in O'Dell v. United States, 326 F.2d 451 (1964), at pages 455 and 456:

"A court of bankruptcy does have jurisdiction and power to determine a controversy between third parties concerning the ownership of property in which neither the bankrupt nor the trustee has title if it is impossible to administer completely the estate of the bankrupt without determining that controversy. Riverview State, 10 Cir., 217 F.2d 455, Central State Corp. v. Luther, 10 Cir., 215 F.2d 38, at 45, and cases cited therein. And, the right to a plenary suit is a procedural right which may, of course, be waived. Reconstruction Finance Corp. v. Riverview State Bank, supra, 217 F.2d at 459, and cases therein cited. Thus, one who invokes the jurisdiction of the bankruptcy court by filing a claim with that court, or who fails to object to the summary jurisdiction of the court at the earliest opportunity, thereby consents to such jurisdiction. Commercial Discount Company v. Rutledge, 10 Cir., 297 F.2d 370; Inter-state National Bank of Kansas City v. Luther, supra, and cases therein cited; James Talcott, Inc. v. Glavin,

3 Cir., 104 F.2d 851, 853. Cert. denied, 308 US 598, 60 S.Ct. 130, 84 L.Ed. 501. (emphasis supplied)

"With the foregoing principles of law applied to the facts in this case, the lower court's order must be sustained. The controversy concerning title to the fund in the registry of the court was submitted to the Bankruptcy Court with the consent of all parties. The appellant invoked the jurisdiction of the bankruptcy court by filing a motion to impound the funds and therefore consented to the summary jurisdiction of the Bankruptcy Court risking all of the disadvantages which may flow to her as a consequence, as well as gaining all of the benefits."

The summary jurisdiction, either by express or implied consent as above discussed, is a procedural jurisdiction to proceed to determine controversies over property; i.e., subject matter. The adverse claimant's right to a plenary action may be waived since it is a procedural privilege. This matter was dealt with by the Supreme Court in the case of MacDonald v. Plymouth Trust Company, 286 U.S. 263, 52 S.Ct. 505, 76 L.Ed. 1093 (1932). In this case, the trustee petitioned to set aside certain transfers of property as voidable preferences. The respondent appeared, denied material allegations, but consented in open court to determination of the issue by the referee. The court stated, at pages 266 and 267:

"In cases where the defendant made timely objection to a determination by the referee, it has been said that the referee is without power to hear the issues involved in a plenary suit, and that such a suit, if brought before him, must be dismissed for want of adjudication. * * * Where a suit by the trustee is plenary in character, as are those authorized by section 60b, both parties to it are entitled to claim the benefits of the procedure in a plenary suit, not available

in the summary method of procedure which, under the provisions of the Bankruptcy Act, is employed by the referee. A denial of those benefits would be in effect a denial of the right to a plenary suit, to which both parties are entitled under 60b. But it does not follow that this privilege, extended for the benefit of a suitor, may not, like the right to trial by jury, be waived. See Harrison v. Chamberlain, 271 US 191, 70 L.Ed. 897, 46 S.Ct. 467 * * * , and being waived, that the referee is without the power given to courts of bankruptcy to decide the issues."

The court then said, at page 267:

" * * * and we can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit secured to suitors under sections 60b and 23b, may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted. Chicago B & Q R. Co. v. Willard, 220 US 413, 419-421, 55 L.Ed. 521, 524, 525, 31 S.Ct. 460."

An adverse claimant may by his actions manifest a consent to determination of his claim in the Bankruptcy Court through summary proceedings before the Referee, even though the nature of his claim is such that he has a right to insist that it be decided in a plenary suit. Gill v. Phillips, 337 F.2d 258 (C.A. 5, 1964); rehearing denied 340 F.2d 318.

Adverse claims and controversies between third persons over property involved in settlement of a bankrupt estate can be determined by the Bankruptcy Court if there is no objection by those in interest to exercise of its summary jurisdiction. Central States Corp. v. Luther, 215 F.2d 38 (C.A. 10, 1954); cert. denied 348 U.S. 951, 99 L.Ed. 743, 75 S.Ct. 438. In commenting on the doctrine

of consent to summary jurisdiction, Remington on Bankruptcy, 1968 Supplement, Volume 5, at page 35, states:

> "Jurisdiction cannot be supplied on a court by consent where the Constitution or statutes have failed to confer it, but if the possibility of jurisdiction is there, every presumption will be indulged in favor of its existence."

The present language of Section 2a(7) was incorporated into the Bankruptcy Act by the 1952 amendment. Prior to 1952, there was a trend of decisions which held that in these cases failure to make timely objection constituted consent to summary procedure. But the Supreme Court, in Cline v. Kaplan, supra, held that an adverse claimant was not deemed to have consented to the jurisdiction of the Bankruptcy Court if he made formal objection thereto at any time prior to entry of a final order. The reaction to the Cline decision brought about the 1952 amendment to 2a(7). The legislative history of that amendment, as set forth in H.R. Rep. 2320 on S. 2234, 82d Cong. 2d Sess. 4 (1952), makes its purpose and intent clear:

> "9. Section 2(b) of the bill amends section 2a (7) of the act by adding a provision correcting a defect which has developed in section 23a of the act. It has seemed wiser, however, to amend section 2a (7) rather than section 23a, in order to make the change applicable to the entire act including the debtor relief chapters.
>
> "The bankruptcy court, where a controversy involves property not in its actual or constructive possession, and adversely held, nevertheless has summary jurisdiction if the respondent consents thereto; and it has generally been held that a respondent consented when he did not object to such jurisdiction, either by preliminary motion or in his answer, and proceeded on the merits. Moonblatt v. Kosmin, 55 Am. B. R. (N. S.) 267, 139 F. 2d 412 (C. C. A. 3, 1943).

However, in 1944, in Cline v. Kaplan, 323 U. S. 97, the Supreme Court overruled this line of cases and held, in effect, that a respondent is not to be deemed to have consented, if he made formal objection to the summary jurisdiction at any time before entry of the final order in the proceeding, even though the controversy had been proceeded with on its merits without his objecting to jurisdiction. This holding has unsettled sound procedure and an expeditious administration in bankruptcy. A respondent may now proceed on the merits and gamble on a favorable decision. When he perceives or fears that the decision will be against him on the merits, he may interpose his formal objection to jurisdiction at any time before the entry of the order, and, should his objection be sustained, the summary proceeding must be dismissed. In such event, the trustee is required to relitigate the issues in a plenary action.

"The proposed amendment is intended to overcome this unsatisfactory situation and is keyed to rule 12(h) of the Federal Rules of Civil Procedure, which requires the timely interposition of an objection to jurisdiction and, if not so made, the defense is deemed waived."

In commenting on the amendment, Remington on Bankruptcy, 1953 Edition, Volume 5, states at page 350:

"The 1952 amendment of section 2a (7) of the Act approaches the matter from a different angle. Under it, if the adverse party does not interpose objection to summary jurisdiction 'by answer or motion' filed before expiration of time to answer or move, 'he shall be deemed to have consented to such jurisdiction.' He is not merely waiving objections but affirmatively consenting by failure to object in the manner and within the time specified. The change was intended to, and clearly did, render

obsolete the Supreme Court's decision in the Cline case, and other decisions permitting the defendant to avoid consent by delayed objection, or merely to put in a casual objection at any stage of the proceedings, disregard it, and then insist upon it forcefully for the first time when he saw an adverse decision imminent.

"It has almost uniformly been considered too late to raise the objection for the first time on appeal,[2] and the 1952 amendment strengthens this view." (emphasis supplied). (Citations in footnote reference: "Re Prima Co., 98 F. 2d 952, 38 ABR NS 46 (1938, CA 7th Ill), cert. den. Keig v. Harris Trust & Sav. Bank, 305 US 658, 83 L. Ed. 426, 59 S. Ct. 357, 358; Re Tax Service Asso., 95 F. 2d 373, 36 ABR NS 368 (1938, CA Ill), affd. 305 US 160, 83 L. Ed. 100, 59 S. Ct. 131, 38 ABR NS 85, reh. den. 305 US 674, 83 L. Ed. 437, 59 S. Ct. 247.")

The Court of Appeals for the Tenth Circuit, in Inter-state National Bank of Kansas City v. Luther, 221 F. 2d 382 (1955), discussed the implementation of 2a (7), and after reviewing a line of decisions indicating a trend opposed to summary jurisdiction by implied consent, the holding in the Cline case, and the resulting criticism, stated, at page 387:

"Apparently inspired by this criticism and these recommendations, the Congress amended section 2, sub. a(7), of the Bankruptcy Act, 11 U. S. C. 11, sub. a (7), to provide that * * *." (The court here quotes statutory language.) "The amendment was keyed to Rule 12(h), Federal Rules of Civil Procedure, and was designed to bring waiver and consent in bankruptcy cases into conformity with the requirements of that applicable rule."

General Order 37 of the General Orders in Bankruptcy, adopted by the Supreme Court of the United States, as amended May 29, 1961, effective July 19, 1961 [1/], makes the Federal Rules of Civil Procedure applicable in bankruptcy proceedings insofar as they are not inconsistent with the Bankruptcy Act. The language of H.R.Rep. 2320 on S. 2234, 82d Cong. 2d Sess. 4 (1952); the case law as set forth in Inter-state National Bank of Kansas City v. Luther, supra; and the comments of Clarence Clyde Ferguson in "The Consensual Basis of Subject-Matter Jurisdiction in Matters of Bankruptcy: Fact and Fiction" -- XIV Rutgers Law Review, Spring 1960, No. 3, demonstrate the application to bankruptcy proceedings of Rule 12(h) of the Federal Rules of Civil Procedure. The Law Review article, at page 509, states:

> "The issue of the applicability of Rule 12 (h) itself discloses an understanding of the nature of the subject matter of 2a (7) consent clause. Rule 12b(2) excepts from the application of 12(h) objections asserting lack of subject matter jurisdiction of the court. Consequently, it might be initially supposed that the draftsmen of the 1952 amendment to 2a (7) intended solely to reach the question of the manner of exercise of jurisdiction and not the problem of basis of jurisdiction. But the procedural right to a plenary proceeding has always been recognized as waivable. In re Nathan, 98 F. Supp. 686 (S.D. Cal. 1951); American Employers Ins. Co. v. Leach, 119 F.Supp. 578 (D. Colo. 1954). Thus, where the trustee institutes summary proceedings 2a(7) operates as an omnibus

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1/ "37.--General Provisions. In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding."

consent provision upon the adverse claimant's failure to object: (1) to the existence of subject matter jurisdiction and (2) to the exercise of that jurisdiction summarily. There is support for such a construction in the legislative history of the 1952 amendment to 2a (7). It clearly appears that the amendment was intended to regulate the procedural defense against summary proceeding where the adverse party was in the position to lay claim to a plenary proceeding."

Application of Legal Principles
Relating to Summary Jurisdiction to the Facts

The Doctors expressly consented to the summary jurisdiction of the Bankruptcy Court —

The Doctors, through their counsel, at the hearing on the Order to Show Cause, indicated in response to inquiry by the Referee in Bankruptcy that they did not have any objection to the exercise of summary jurisdiction by the Bankruptcy Court (Tr. of October 22, 1964 hearing before the Referee in Bankruptcy - J.A. 53-55). Accordingly, having expressly consented, the Doctors have no basis for later objecting to the summary jurisdiction of the Bankruptcy Court in their Petition for Review filed to the Referee's order of June 20, 1968, which order determined issues on the merits relating to the Escrow Fund and was in no manner directed to the court's summary jurisdiction which had not been in issue before the Bankruptcy Court.

The Doctors impliedly consented to the summary jurisdiction of the Bankruptcy Court over controversies relating to the Escrow Fund --

1. The Doctors invoked the summary jurisdiction of the Bankruptcy Court by seeking its affirmative relief in the answer of William T. Spence to Order to Show Cause and for order directing release of the funds to William T. Spence (J.A. 36-41).

As part of the pleading, the said Spence, acting for himself and other doctors, prayed " * * * that an order be entered herein releasing the Twelve Thousand.Two Hundred ($12,200.00) Dollars and directing the First National Bank of Arlington to pay over to William T. Spence the sum of Twelve Thousand Two Hundred ($12,200.00) Dollars."

2. The Doctors further expressly invoked the summary jurisdiction of the Bankruptcy Court by the filing by them of motions for leave to file petitions for reclamation (J.A. 121) in which they each asserted a right to a specific portion of the Escrow Account which had been ordered turned over to the Trustee in Bankruptcy by the Referee's order of February 20, 1968 (J.A. 122).

Assuming, arguendo, that the Doctors, through counsel, had not expressly consented to the summary jurisdiction of the Bankruptcy Court as set forth in "1" above, by virtue of the express provisions of Section 2a(7), the Doctors are deemed statutorily to have consented to the summary jurisdiction of the Bankruptcy Court over the Escrow Account and controversies arising therewith. The Doctors invoked the equitable jurisdiction of the Bankruptcy Court by affirmatively seeking a determination as to their entitlement to a portion of said account.

3. The Doctors are deemed to have consented to the summary jurisdiction of the Bankruptcy Court under the express provisions of the Bankruptcy Act by their failure timely to oppose its jurisdiction.

The Trustee's Motion to Enjoin William T. Spence, et al. (J.A. 33), paragraphs 6 and 7, affirmatively invoked the summary jurisdiction of the Bankruptcy Court. The Referee's order of September 17, 1964 (J.A. 27) enjoining William T. Spence, et al., specifically fixed a time within which Spence was directed to file written opposition to the Trustee's motion by providing for a responsive pleading to be filed on or before five (5) days from the date of the hearing fixed by said order (October 22, 1964). Accordingly, the time for objecting to the summary jurisdiction of the Bankruptcy

Court by answer was fixed by order of court for October 17, 1964, five (5) days prior to the date of hearing fixed by said order. The only responsive pleading filed by the Doctors, through Spence, was the Answer of William T. Spence to the Order to Show Cause and for an Order Directing the Release of Funds to William T. Spence (J. A. 36). There is no opposition, express or implied, to the summary jurisdiction of the Bankruptcy Court in the answer filed. Further, on the contrary, counsel for the Doctors, at the hearing on October 22, expressly indicated no objection to the summary jurisdiction as set forth above, thus negativing any possible inference to be drawn from the answers that the respondents opposed or objected to the Bankruptcy Court's summary jurisdiction to determine the controversy relating to the Escrow Fund. As the record demonstrates, the answer of William T. Spence is an answer on the merits raising factual and legal issues submitted for determination by the Bankruptcy Court in the exercise of its jurisdiction. Further, conclusively supporting the Trustee's position herein, counsel for the Doctors in the Opposition to Motion for Summary Affirmance affirmatively and expressly admitted that no objection to the Bankruptcy Court's summary jurisdiction had ever been taken in the Bankruptcy Court and that such an issue was raised for the first time in the Petition for Review before the District Court, arguing that objection to the jurisdiction of the Bankruptcy Court could be raised at any time including while on appeal. See page 4 of said opposition in which counsel argues:

> 'It is true that no plea was filed to the jurisdiction of the Bankruptcy Court and that actually nothing was filed covering this matter until the Petition for Review was filed in the United States District Court, but it is contended that the plea to the jurisdiction of the court may be filed at any time, even in the Court of Appeals and the Circuit Court of Appeals must decide whether the District

Court had jurisdiction of the action although such question was not raised by the parties."

The express language of 11 U.S.C. 11a(7) (Section 2a(7), Bankruptcy Act), as amended in 1952 to overcome the impediment to expeditious summary procedure resulting from the decision in Cline v. Kaplan, supra, leaves no doubt or ambiguity that where an adverse claimant fails to object timely to the summary jurisdiction of the Bankruptcy Court, by answer or motion filed before the time prescribed (inter alia, by order of court for the filing of an answer to the motion or other pleading to which said party is adverse), said adverse party " * * * shall be deemed to have consented to such jurisdiction."

4. The Petition to Review the Referee's order of June 20, 1968, and the appeal from the order of the District Court of December 30, 1968, denying Petition for Rehearing Petition for Review is an untimely effort to review and appeal from the Referee's order of October 27, 1964, expressly decreeing summary jurisdiction.

The Referee's order of October 27, 1964, entered upon the hearing on the Trustee's Motion for an Order to Show Cause (J.A. 57) expressly decreed summary jurisdiction of all controversies relating to the claim of the Doctors to the Bankrupt's Escrow Account. The said order expressly made findings as to the court's summary jurisdiction (J.A. 61). The order further determined and decreed the Bankruptcy Court's summary jurisdiction by directing as follows:

"ORDERED: That subject to the jurisdiction and until further order of this court the sum of $12,200.00 now on deposit in the First National Bank of Arlington in the name of Balogh & Company Escrow Account shall remain therein."

Bearing in mind, as set forth above, that counsel for the Doctors (a) expressly indicated no objection to the Bankruptcy Court's summary jurisdiction in response to

the Referee's inquiries at the October 22 hearing, (b) filed an answer on the merits of the Trustee's motion and did not object to the summary jurisdiction in said answer, and (c) affirmatively sought as part of the answer an order directing the release of the funds to Spence, it taxes one's imagination how the Doctors could have, in good faith, sought a review of said order which was entirely consistent with their own position, both affirmatively stated and implied by the facts and in law. Notwithstanding this, however, assuming that as an afterthought counsel for the Doctors decided, due to the ruling of the court in its October 27, 1964 order, that he would petition for review of said order premised on his now stated position that the objection to the jurisdiction of a court may be asserted at any time, even raised for the first time, on appeal, it is quite obvious that the time for such a petition for review and appeal as to summary jurisdiction of the Bankruptcy Court was from its order of October 27, 1964. However, the Doctors, more than 3-1/2 years later, and after extensive hearings by the Bankruptcy Court on the merits of the controversy relating to the escrow fund, elect to raise the jurisdictional issue for the first time on a review of the Referee's order of June 20, 1968, ruling adversely to the claims of the Doctors on the merits.

It was to avoid just such a possible interference with the expeditious administration of the bankruptcy estate and determination of issues and controversies relating to property that gave rise to the 1952 amendment to the Bankruptcy Act, overcoming the effect of the decision in Cline v. Kaplan, supra. The fact situation in Cline v. Kaplan is far less of an aggravated interference with the Bankruptcy Court's expeditious summary jurisdiction than the facts presented in the present case. Nonetheless, in order to avoid such undue delay and interference with expeditious administration, Congress amended Section 2a(7) of the Bankruptcy Act. The present section, as amended, is clear, unambiguous, and has, as the citations above set forth reveal, been applied to strike down such delaying procedures as here

evident. As the cases hold, the right of an adverse claimant to a plenary action is a procedural privilege that may be waived, the waiver constituting consent to summary adjudication of the controversy (See legal argument, supra). The said procedural right has been analogized to the right to waive a trial by jury by not expressly requesting such trial under the provisions of the Federal Rules of Civil Procedure. Therefore, the specious argument of the Doctors' counsel in his brief that a plea to the court's jurisdiction may be made at any time is wholly without merit in view of the applicable law relating to the summary jurisdiction of the Bankruptcy Court by actual or implied consent. Counsel's further argument in his brief that Rule 12(h) of the Federal Rules of Civil Procedure requires that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter is answered by reference to 12(b)[1/] of the Federal Rules of Civil Procedure which excepts from the application of 12(h) objections asserting lack of subject matter jurisdiction of the court. Reference is made to the quotation from the comments of Clarence Clyde Ferguson in XIV Rutgers Law Review, supra (p. 21).

1/ "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Accordingly, under the application of the express provisions of 11 U.S.C. 11a(7) (Bankruptcy Act, Section 2a(7)) to the facts of the present case, the Doctors are deemed to have consented to the summary jurisdiction of the Bankruptcy Court to determine the controversy relating to their claims to the Escrow Fund. Further, arguendo, even were this not so, by express statutory provision, the failure of the Doctors to file a petition to review the Referee's order of October 27, 1964 (J.A. 57), precludes their present appeal from the order of June 20, 1968, on the basis of objection to the summary jurisdiction of the Bankruptcy Court. Title 11 U.S.C. 47a (Bankruptcy Act, Section 24a) supports the position that:

> "The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: * * * ."

Since the controversy relating to the Escrow Account is a controversy arising in proceedings in bankruptcy, an appeal from the order of October 27, 1964, expressly decreeing the summary jurisdiction of the Bankruptcy Court over the Escrow Account, would lie whether said order be interlocutory or final.

5. The provisions of 11 U.S.C. 107a(1) (Bankruptcy Act, Section 67a(1)), relating to the summary jurisdiction of the Bankruptcy Court over Trustee's avoidance of liens through legal and equitable proceedings arising within 4 months of bankruptcy are inapplicable.

Counsel for the Doctors, in his argument set forth in his brief, relies heavily on the provisions of Title 11 U.S.C. 107a(1) (Bankruptcy Act, Section 67a(1)) relating

to avoidance of liens through legal and equitable proceedings which arose while the bankrupt was insolvent and within four (4) months of bankruptcy. Title 11 U. S. C. 107a(4) (Bankruptcy Act, Section 67a(4)) expressly confers by statute summary jurisdiction of the Bankruptcy Court to hear and determine the rights of any parties under subdivision "a". The thrust of appellants' counsel's argument is that since the attachment on the Escrow Account arising from the Spence attachment action filed in the Circuit Court, Arlington County, was made upon the bank more than four (4) months prior to the filing of the petition in bankruptcy, the Bankruptcy Court lacks summary jurisdiction to avoid the attachment lien upon the Escrow Account. The Doctors' counsel misconceives the Trustee's proceeding initiated by the filing of a motion directed to Spence and others to show cause why the Escrow Fund should not be turned over to the Trustee and the court determine all controversies in relation thereto. The Trustee's motion did not seek to avoid the attachment lien which arose more than four (4) months before bankruptcy. It did seek, however, to have the Bankruptcy Court exercise its summary jurisdiction to determine the controversies between the Doctors and the Trustee, representing the interest of creditors of the bankrupt, as to who was entitled to the balance of $12,200.00 remaining in the account. The attachment lien did not affect the rights of the parties to the fund but merely placed a lien thereon by attachment before judgment to preserve the fund for the ultimate person entitled thereto upon adjudication of the controversy between the Doctors and the Bankrupt.

Assuming, arguendo, that the attachment under Virginia law divested the Bankrupt of actual control and possession over the fund so that at the date of bankruptcy the fund would not be deemed under the Bankrupt's actual or constructive possession, nevertheless, by the application of the provisions of Section 2a(7), by the express consent of the Doctors' counsel, and by the implied consent arising upon

the affirmative relief sought by the Doctors, the objection to the exercise of the summary jurisdiction by the Bankruptcy Court over the Escrow Account due to lack of actual or constructive possession was waived by the Doctors. The decision of the Third Circuit Court of Appeals In the Matter of Consolidated Container Carriers, Inc., Bankrupt, Maurice Stearn, Trustee, Appellant, 385 F.2d 362, relied upon by appellants' counsel in his brief, sets forth perfectly good and sound principles of law relating to facts arising upon the Trustee's application to avoid the attachment under the provisions of Section 67a, and is, therefore, distinguishable from the facts herein. In that case, a writ of foreign attachment was issued against the bankrupt more than four (4) months prior to the filing of an involuntary petition effecting attachment on the debtor's bank account in the Continental Bank & Trust Company. The Referee held the Bankruptcy Court had summary jurisdiction. No judgment had been obtained by the attaching creditor against the bankrupt. Applying the provisions of Section 67a(1), the court of appeals held that since the attachment was executed more than four (4) months prior to the commencement of the bankruptcy proceeding that the Bankruptcy Court did not have summary jurisdiction to determine the controversy relating to the fund and that plenary proceedings would have to be instituted.

The court determined the legal incidence of the foreign attachment law of Pennsylvania stating that its purpose was to attach the property of an out-of-state defendant and to compel his appearance. The court held that the attachment statute deems the attached property to be outside the possession and control of the defendant and in custodia legis from the moment of the service of the writ of attachment. Since the attachment constituted a lien on the bank account more than four (4) months prior to the filing of the bankruptcy petition, the court held that the Bankruptcy Court lacked summary jurisdiction over said account. The court, however, goes on to distinguish its decision from the decision of In re Boylan, 65 F. Supp. 105 (E.D. Pa. 1946), in

which case the creditor of the bankrupt obtained two judgments in 1926 and in 1930 filed attachment executions against a debtor of the bankrupt for money owing to the bankrupt. In 1945 the debtor filed a voluntary petition in bankruptcy. In the interim, the creditor took no further steps in the garnishment proceeding. The question was whether the bankruptcy court had jurisdiction over the property subject to the attachment lien. The court held it did for reason that in the Boylan case, the creditor had voluntarily submitted himself to the jurisdiction of the bankruptcy court by filing his proof of claim.

The court held, in the Consolidated Container case, that since the bank was in the position of bankrupt's debtor, it is not subject to the summary jurisdiction of the bankruptcy court unless it consents to such jurisdiction. In said case, the bank objected.

The law was correctly applied in the Consolidated Container case to the facts before the court. However, the facts in that case are distinguishable in material detail to the present facts. In addition to the consent of counsel for the Doctors to the summary jurisdiction of the Bankruptcy Court, the Bank consented to the summary jurisdiction of the Bankruptcy Court (J.A. 54). Therefore, it is respectfully submitted that had the bank in the Consolidated Container case consented to the summary jurisdiction of the court, the decision would have been different.

In the Consolidated Container case, both the attaching creditor and the bank expressly objected to the summary jurisdiction of the Bankruptcy Court, and at no time by their conduct gave rise to any basis for assertion of the doctrine of implied consent. The Consolidated Container case is thus fully distinguishable on its facts. To the same effect is the case of Griffin, et al. v. Lenhart, et al., 266 F. 671 (C.A. 4, 1920), a case which held that where attachment liens issued by a state court were levied and were established more than four (4) months prior to bankruptcy, the bankruptcy court was not to interfere with the jurisdiction of the state

court to enforce said liens. The case does not deal with the summary jurisdiction of the Bankruptcy Court under Section 2a(7).

Appellants' citation of the Consolidated Container and Griffin cases add nothing to the appellants' position since the cases set forth law correctly applied to the facts therein and are distinguishable from the facts herein.

Counsel for appellants also relies upon the case of Alexander v. Westgate, 111 F. 2d 769 (C. C. A. 9, 1940), for the proposition that in order for the Bankruptcy Court to have summary jurisdiction, it is necessary that the court have original jurisdiction of the proceedings and that the question of jurisdiction of the Bankruptcy Court may be raised at any time. The facts of this case involve a bill of complaint in the said court alleging that a controversy involves a sum in excess of $3, 000. 00 and alleges that defendants were citizens of different states but fails to allege citizenship of the plaintiff and, therefore, must be dismissed for want of jurisdiction under Title 28 U. S. C., Section 1331, where other grounds of jurisdiction are not involved. This case does not arise in a proceeding in bankruptcy and there is no mention of the Bankruptcy Act nor does it involve the interpretation of the summary jurisdiction of the Bankruptcy Court.

The case of Duvall v. Southern Municipal Corporation, 63 A. 2d (Mun. Ap. D. C. 1949), holds that where the Municipal Court for the District of Columbia is without jurisdiction to determine issues involving title to real estate, such jurisdiction over the subject matter may not be conferred on that court by consent by defendant's failure to raise the defense in the form of a motion before trial, and that defendant is not precluded from raising this defense at the trial of the action.

The Doctors rely heavily on the holding in Jackson v. Kuhn, 254 F. 2d 555 (C. A. 8, 1958), for the doctrine that Rule 12(h) of the Federal Rules permits them to raise the question of jurisdiction for the first time on appeal. The case deals with the question of original jurisdiction of federal courts under Title 28 U. S. C. Section

1331, and arises out of an action for an injunction and declaratory judgment to enjoin defendant, military personnel, from policing, occupying, or interfering with property, students, or operation of a public high school and does not in any way deal with the summary jurisdiction of the Bankruptcy Court.

These cases, relied upon by the appellants, bringing into interpretation Title 28 of the United States Code, are inapplicable and inappropriate and irrelevant to the interpretation of the application of the jurisdictional provisions of the Bankruptcy Act relating to its exercise of summary jurisdiction.

6. The Referee's order of June 20, 1968, denying the Doctors leave to file petitions for reclamation, to which a Petition for Review was filed, invoked the equitable doctrine of unclean hands, and no issue was argued on review to the correctness of the Referee's ruling on its merits.

Counsel for the appellants states in his brief that the sole issue before this court on appeal is whether or not the Bankruptcy Court has summary jurisdiction of a foreign attachment proceeding issued and served more than four (4) months before bankruptcy. The issue stated by counsel completely begs the true issue as determined in the Referee's order of June 20, 1968 (J.A. 20). As admitted by the Doctors' counsel, the jurisdictional issue was for the first time ascertained in the Petition for Review. Such issue was not before the Referee as an issue determined by his order of June 20, 1968. Such issue as to the Referee's jurisdiction had been finally determined by the Referee's affirmatively decreeing summary jurisdiction in his order of October 27, 1964, from which no review or appeal was taken.

Under the provisions of General Order 47 of the General Orders in Bankruptcy, adopted by the Supreme Court of the United States, as amended May 29, 1961, effective July 19, 1961 [1/], the reviewing court must accept the Referee's findings of fact unless clearly erroneous. The same principle is applicable to findings of fact on appeal. The Doctors do not set forth in the Petition for Review filed any alleged error in the Referee's findings of fact in his order of June 20, 1968, adopting his memorandum of June 14, 1968, which contained exhaustively detailed findings of fact and conclusions of law. Accordingly, the true issue on review and appeal, however never raised by the Doctors, is whether or not there was either (a) error in the findings of fact or (b) error in the application of law as stated in the Referee's conclusions of law applying the doctrine of unclean hands to the Doctors and their counsel in denying the filing of petitions for reclamation. The appellants, through counsel, choose to ignore the Referee's order, its findings and conclusions, and to petition to review on the issue of lack of summary jurisdiction which had never been raised and which could not then be raised as it was untimely. It is apparent that the review seeking to test a jurisdictional issue for the first time raised on review was an afterthought of counsel for the Doctors. Further, the Doctors do not undertake an appeal to this court from the order of the District Court of November 21, 1968, denying the Petition for Review and affirming the Referee, but undertake to take an appeal from the order of the District Court of December 30 denying the Petition for Rehearing Petition on Review.

1/ "47. --Reports of Referees and Special Masters. Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

CONCLUSION

Trustee's counsel respectfully suggests that the entire review and appeal are frivolous, designed for delay, and continue a course of vexatious litigation initiated in 1959. Appellee suggests that this court should dismiss the appeal and surcharge the appellants with all taxable costs. Appellants' counsel has chosen to limit the appeal to a jurisdictional issue and in so doing necessitated a complete review of the history of the issue between the appellants and the appellee beginning with the appellee's Motion for an Order to Show Cause filed in September 1964 (J. A. 31). The appellants' counsel would have the court consider that the inclusion in the contents of the Joint Appendix by appellee of pleadings and memoranda beginning in 1964 is unnecessary since he chooses to raise a single jurisdictional issue which had never been challenged in the Bankruptcy Court. Appellee respectfully submits that in order for this court reasonably to determine the total lack of merit of appellants' contention regarding jurisdiction, it was necessary to review the history of litigation between the Doctors and the Trustee.

It is respectfully submitted that the appeal should be dismissed with all taxable costs assessed against the appellants.

Respectfully submitted,

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